Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 24 MAY 23, 1990 No. 21

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90–38)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued February 20, 1990, to April 27, 1990, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

DRA–1–09
Date: May 4, 1990
File: 222333

JERRY LADERBERG,
Acting Director,
Commercial Rulings Division.

(A) Company: Abbott Laboratories
Articles: Liquid concentrate Isomil soy protein infant formula
Merchandise: Isomil powder infant formula
Factories: North Chicago, IL (2)
Statement signed: October 26, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, March 5, 1990

(B) Company: Anacomp Inc., Micrographics Manufacturing Div.
Articles: Vesicular and diazo film
Merchandise: Polyester film
Factories: Sunnyvale, CA (3)
Statement signed: November 20, 1989

Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), April 16, 1990

(C) Company: Connell Ltd. Partnership, Wabash Alloys Div.
Articles: Aluminum alloys ingots
Merchandise: Silicon metal
Factories: Wabash, IN; Dickson, TN; Oak Creek, WI
Statement signed: August 21, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Houston, March 15, 1990

(D) Company: B.C. Cook & Sons Enterprises, Inc.
Articles: Grapefruit juice from concentrate (reconstituted juice); frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Plymouth, IN
Statement signed: December 5, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, April 17, 1990
Revokes: T.D. 89–32–D

(E) Company: Cox Creek Refining Co.
Articles: Electrolytic copper cathodes; copper rod
Merchandise: Copper anodes
Factory: Anne Arundel County, MD
Statement signed: March 2, 1990
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), April 2, 1990
Revokes: Unpublished authorization letter of January 9, 1990

(F) Company: E.I. du Pont de Nemours & Co., Inc.
Articles: Formaldehyde; 1,4–butanediol; tetrahydrofuran; "TERATHANE" (polytetramethylene ether glycol)
Merchandise: Methanol; 1,4–butanediol (BDO)
Factories: Toledo, OH; Houston, TX; Niagara Falls, NY; Denton, NC; Linden, NJ; Belle, WV
Statement signed: November 16, 1989
Basis of claim: Used in
Rate forwarded to RCs of Customs: New York & boston (Baltimore Liquidation), February 20, 1990
Revokes: T.D. 89–54–G

(G) Company: Ethyl Corp.
Articles: Tetrabromobisphenol–A
Merchandise: Bisphenol–A
Factory: Magnolia, AR
Statement signed: July 12, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, March 15, 1990

(H) Company: Halstead Industries, Inc.
Articles: Copper tubing in coils; straight copper tubes
Merchandise: Copper cathodes and ingots
Factories: Pinehall, NC; Wynne, AR; Zelienople, PA
Statement signed: September 14, 1989
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: Chicago, April 13, 1990

(I) Company: Hazlett Strip-Casting Corp.
Articles: Finished dam blocks
Merchandise: Cupro nickel plates
Factory: Colchester, VT
Statement signed: November 22, 1989
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: New York, March 16, 1990

(J) Company: Fluorocarbon Co., Bunnell Plastics Div.
Articles: Rod, tube, sheets, tape, shapes, pipe liners, and molded products
Merchandise: Fluorinated ethylene polymer
Factory: Mickleton, NJ
Statement signed: January 24, 1990
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, March 2, 1990
Revokes: T.D. 84–155–D to cover successorship from Bunnell Plastics, Inc.

(K) Company: Fluorocarbon Co., Bunnell Plastics Div.
Articles: Rod, tube, sheets, tape, shapes, pipe liners, and molded products
Merchandise: Teflon PFA
Factory: Mickleton, NJ
Statement signed: January 24, 1990
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, March 2, 1990
Revokes: T.D. 84–155–E to cover successorship from Bunnell Plastics, Inc.

(L) Company: Hermes Abrasives, Ltd.
Articles: Industrial coated abrasives
Merchandise: Cotton cloth
Factory: Virginia Beach, VA
Statement signed: April 5, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), March 6, 1990
Revokes: T.D. 89–23–O

(M) Company: Himont U.S.A., Inc.
Articles: Polypropylene homopolymers; polypropylene copolymers; polyethylene homopolymers
Merchandise: Propylene and ethylene monomers; catalysts
Factories: Bayport, TX; Lake Charles, LA
Statement signed: February 22, 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation
Rate forwarded to RC of Customs: New York & Boston (Baltimore Liquidation), March 15, 1990

(N) Company: Hoechst Celanese Corp.
Articles: Polyester polymer chip, staple fiber and filament yarn
Merchandise: Ethylene glycol
Factories: Salisbury & Shelby, NC; Spartanburg & Greer, SC
Statement signed: September 8, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, March 15, 1990

(O) Company: Huls America, Inc.
Articles: Lubricants and plasticizers
Merchandise: Tri-decyl alcohol; adipic acid; isodecyl alcohol; 2–ethyl hexyl alcohol (2–ethyl hexanol)
Factory: Chestertown, MD
Statement signed: November 22, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 16, 1980
Revokes: T.D. 89–29–P

(P) Company: Kemin Industries, Inc.
Articles: Pigmenters (Oro Glo liquid; Oro Glo dry; Kemin yellow; Oro Glo 7; Oro Glo broiler; and Oro Glo layer)
Merchandise: Marigold oleoresin
Factories: Des Moines, IA; Hereford, TX
Statement signed: February 8, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, April 26, 1990

(Q) Company: Eastman Kodak Co., Tennessee Eastman Co. Div.
Articles: Bright amber polyethylene terephthalate (PET)
Merchandise: Copper phthalocyanine blue pigment; 1,5–dichloroanthraquinone; o-mercaptobenzoic acid
Factory: Kingsport, TN
Statement signed: May 10, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), March 26, 1990

(R) Company: Lonza, Inc.
Articles: Methyl acetoacetate (MAA)
Merchandise: Methanol
Factory: Pasadena, TX
Statement signed: January 25, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York & Boston, April 18, 1990

(S) Company: Marketing International, Inc.
Articles: Grapefruit juice from concentrate (reconstituted juice); frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Plymouth, IN
Statement signed: December 5, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, March 16, 1990
Revokes: T.D. 87–99–P

(T) Company: Nashua Corp.
Articles: Nashua thermal paper
Merchandise: PSD–140 (3–isopentyle ethyl amino–6–methyl–7–anilinofluoran); DCF—red leuco dye; DBT (dibenzylterephthalate); Mixxim AO–30 (1,1,3–tris(2–methyl–4–hydroxy–5–tert–butylphenyl)–butane)
Factories: Merrimack & Nashua, NH
Statement signed: March 22, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 2, 1990

(U) Company: Orange-co of Florida, Inc.
Articles: Orange juice from concentrate (reconstituted juice); frozen concentrated orange juice; bulk concentrated orange juice; special concentrated orange blend
Merchandise: Concentrated orange juice for manufacturing
Factory: Bartow, FL
Statement signed: February 28, 1990

Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, March 16, 1990
Revokes: T.D. 84–2–N

(V) Company: PMC Specialties Group, a Division of PMC Inc.
Articles: Alkali blue; alkali blue flush
Merchandise: Aniline salt
Factories: Fords, NJ; Chicago, IL
Statement signed: July 5, 1989
Basis of claim: Used in
Rate forwarded to RCs of Customs: New York & Chicago, March 16, 1990

(W) Company: Pfizer, Inc.
Articles: Sulbactam
Merchandise: 6–aminopenicillanic acid a/k/a/ 6–APA
Factory: Groton, CT
Statement signed: January 5, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 9, 1990

(X) Company: Polaroid Corp.
Articles: Cookies (disks)
Merchandise: Poly (ethylene terephthalete) film [web stock media]
Factory: Waltham, MA
Statement signed: June 15, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 9, 1990

(Y) Company: Tree Top, Inc.
Articles: Orange juice from concentrate (reconstituted juice); orange ades; orange juice drink; citrus juice blend or mix; fruit juice blend or mix
Merchandise: Concentrated orange juice for manufacturing
Factories: Selah & Cashmere, WA
Statement signed: October 13, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, March 19, 1990

(Z) Company: Wacker Silicones Corp.
Articles: Silicone fluid
Merchandise: ME-Siloxane; PDM–Siloxane
Factory: Adrian, MI
Statement signed: September 27, 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation
Rate forwarded to RC of Customs: New York, April 27, 1990

APPROVALS UNDER T.D. 84–49

(1) Company: Coastal Eagle Point Oil Co.
Articles: Petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factory: Westville, NJ
Statement signed: February 23, 1989
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, March 26, 1990
Revokes: T.D. 87–100–4

(2) Company: Coastal Refining & Marketing, Inc.
Articles: Petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factory: Corpus Christi, TX
Statement signed: February 23, 1989
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, March 26, 1990
Revokes: T.D. 71–44–2 (Coastal States Petroleum Co.)

(T.D. 90–39)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR APRIL 1990

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

April 2, 1990	$0.006099
April 3, 1990	.006114
April 4, 1990	.006122
April 5, 1990	.006109
April 6, 1990	.006121
April 10, 1990	.006105
April 11, 1990	.006156
April 12, 1990	.006148
April 13, 1990	.006154

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for April 1990 (continued):

Greece drachma (continued):

April 16, 1990	$0.006148
April 17, 1990	.006120
April 18, 1990	.006120
April 19, 1990	.006131
April 20, 1990	.006088
April 23, 1990	.006051
April 24, 1990	.006046
April 25, 1990	.006072
April 26, 1990	.006068
April 27, 1990	.006072
April 30, 1990	.006072

South Korea won:

April 2, 1990	$0.001419
April 3, 1990	.001415
April 4, 1990	.001412
April 5, 1990	.001412
April 6, 1990	.001410
April 10, 1990	.001409
April 11, 1990	.001409
April 12, 1990	.001410
April 13, 1990	.001410
April 16, 1990	.001410
April 17, 1990	.001409
April 18, 1990	.001409
April 19, 1990	.001409
April 20, 1990	.001411
April 23, 1990	.001413
April 24, 1990	.001413
April 25, 1990	.001412
April 26, 1990	.001410
April 27, 1990	.001410
April 30, 1990	.001409

Taiwan N.T. dollar:

April 2, 1990	$0.037863
April 3, 1990	N/A
April 4, 1990	.037864
April 5, 1990	N/A
April 6, 1990	.037893
April 10, 1990	.038052
April 11, 1990	.037979
April 12, 1990	.037922
April 13, 1990	.037983
April 16, 1990	.037928
April 17, 1990	.037915
April 18, 1990	.037920
April 19, 1990	.037935
April 20, 1990	.037936
April 23, 1990	.037909
April 24, 1990	.037911

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for April 1990 (continued):

Taiwan N.T. dollar (continued):

April 25, 1990	$0.037922
April 26, 1990	N/A
April 27, 1990	.037904
April 30, 1990	.037869

(LIQ–03–01 S:NISD CIE)

Dated: May 8, 1990.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 90–40)

REINSTATEMENT OF INDIVIDUAL CUSTOMS BROKER LICENSE NO. 5987 ISSUED TO ALBERT KAZANGIAN; TECHNICAL CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The individual Customs broker license No. 5987 issued to Albert Kazangian, which was revoked on March 5, 1990, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641) and section 111.74 of the Customs Regulations (19 CFR 111.74) notice of which appeared under T.D. 90–19 on page 9822 of the Federal Register dated March 15, 1990, has been temporarily reinstated.

Dated: April 26, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, May 14, 1990 (55 FR 20018)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 7, 1990.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 90–55)

Liquidation: Protest, reliquidation of entries already deemed liquidated.

Date: February 23, 1990
File: LIQ–9–02–CO:R:C:E
221137 GG

TO : Area Director of Customs
Kennedy Airport Area
Jamaica, New York

FROM : Director, Commercial Rulings Division
Office of Regulations and Rulings

SUBJECT: Further review of Protest No. 1001–4–000701.

This is in response to the above-referenced protest, dated January 1, 1984, which was forwarded to our office last November for further review. This particular protest concerned two importations of footwear which were entered on May 14 and 19, 1981, respectively. Both entries were automatically liquidated "no change" on May 6, 1983, following an extension of liquidation in January of that same year. A bulletin notice was posted at the customhouse as required by law. Customs subsequently reliquidated the entries at a higher rate of duty on July 28, 1983. A formal demand for payment of the additional duties was made on the surety, the Washington International Insurance Company, on November 4, 1983, which resulted in that company filing the protest at issue on January 9, 1984.

The protestant requested further review; your office has forwarded the protest to Headquarters to resolve the issue of whether an automatic liquidation is a proper liquidation under 19 U.S.C. 1500, which can be voluntarily reliquidated by Customs within 90 days of the automatic liquidation. This issue was raised because the protestant has challenged the validity of automatic liquidations, and maintains that the entries were deemed liquidated and therefore could not be reliquidated by Customs.

After examining the protest, we find that it is unnecessary to address the question of whether the automatic liquidation was proper, because the protestant is precluded from using that issue as a ground for protest.

It is our position that the protestant, Washington International Insurance Company, is barred from challenging the validity of the original liquidation, because the demand for payment was made on the reliquidated, not the liquidated, amount. A reliquidation is a new liquidation and an abandonment of all former ones, and is subject to protest, just as the first liquidation was. *United States* v. *Fensterer & Ruhe,* 12 Ct. Cust. App. 410 (1924). All previous liquidations, such as the May 6, 1983, liquidation, are subsumed by the most recent liquidation, which in this case would be the July 28, 1983, reliquidation. The time to protect begins to run when the entries have been finally liquidated, and not from a previous liquidation which has been abandoned. *Robertson* v. *Downing,* 127 U.S. 607, 613 (1888). Although the time frame within which sureties may protest a liquidation or reliquidation is different from that allowed the other protestants listed in 19 U.S.C. 1514(c)(1) (within 90 days from the date of mailing of the notice for demand for payment instead of within 90 days of notice of liquidation or reliquidation), the underlying principle permitting protest only of the most recent liquidation remains the same for all protestants; applied here, this would allow Washington International Insurance Company to protest only the July 28, 1983, reliquidation, not the earlier liquidation.

Similarly, 19 U.S.C. 1514(d) limits the protest of a reliquidation to issues directly involved in the reliquidation. As discussed in the previous paragraph, the surety could not base its protest on arguments questioning the legality of a prior, abandoned liquidation. The importer of record, Fiesta Shoe Corporation, could have challenged the legality of the automatic liquidation procedure by filing a timely protest. However, the importer's failure to take such action and the subsequent reliquidation of the entry make the automatic liquidation issue a moot point.

The portion of 19 U.S.C. 1514(c)(2) which authorizes a surety with an unsatisfied legal claim under its bond to file a protest within 90 days from the date of mailing of the notice of demand for payment under its bond, was enacted to ensure that a surety's right to pursue legal recourse would not be prejudiced if a demand for payment

were made only after the usual time for filing a protest had expired. It accomplished this purpose by permitting a surety to file a protest in its own name and by extending the time within which a surety could file a protest. See legislative history to Public Law 96–39, printed in 1979 U.S. Code Cong. and Adm. News, 381 at p. 640. 19 U.S.C. 1514(c)(2) does not disturb the previously-discussed rule that only finally-liquidated entries, as opposed to previously-liquidated-but-now-abandoned entries, may be protested; restated simply, it merely serves to give a surety sufficient time to protest a final liquidation or reliquidation. *See Peerless Insurance Co.* v. *United States*, 703 F. Supp. 104, Slip Op. 88–177 (CIT 1988). Thus, Washington International Insurance Company may not protest the validity of the original liquidation; to permit it to do so would expand the surety's rights beyond those contemplated by law.

For the reasons outlined above, you are directed not to grant the protest on the basis of the automatic liquidation issue; you, may, however, take into account the merits of the other arguments raised by the protestant.

(C.S.D. 90–56)

Valuation: The dutiability of certain buying commissions paid to a related foreign company in exchange for services in aiding in the purchase of merchandise from foreign manufacturers.

Date: March 8, 1990
File: HQ 544431
VAL CO:R:C:V 544431DHS
Category: Valuation

JOHN MAILLARD
TRIUMPH-ADLER-ROYAL, INC.
200 Sheffield Street
P.O. Box 1038
Mountainside, New Jersey 07092

Re: Buying commissions.

DEAR MR. MAILLARD:

This is in reply to your letter of March 8, 1989, regarding the effect of section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA: 19 U.S.C. 1401a(b)), on certain transactions entered into by your client's company. You request a binding ruling regarding the dutiability of certain commissions paid to a related foreign company in exchange for services in aiding in the purchase of merchandise from foreign manufacturers.

Facts:

You state that, Triumph-Adler-Royal, Inc., utilizes the services of its parent Triumph-Adler AG in order to purchase products from the Far East. You state that the purchase order and service departments of the parent are responsible for performing the services of receiving and reviewing purchase orders from various subsidiaries of the parent; combining these purchase orders for the purpose of negotiating volume prices from independent vendors for each of its subsidiaries; locating vendors; controlling shipping date; minimizing handling and payment costs for each subsidiary. You state that the vendors all know the importer. Since you have not submitted any information regarding the relationships of the vendors with the agent or the importer, we are assuming that these parties do not fall within the definition of related parties under section 402(g) of the TAA.

The parent is to receive a 3 percent fee from the related U.S. importer for performing these services. You state that the fee is not to be remitted to nor shared with the vendors. A separate invoice is to be issued by the independent vendors.

You have not submitted any documentation regarding the concerned transactions or a buying agency agreement.

Issue:

Are the activities performed by the foreign parent sufficient to conclude that a buying agency exists?

Law and Analysis:

For the purpose of this prospective ruling request, we are assuming that transaction value will be applicable as the basis of appraisement.

Transaction value is defined in section 402(b)(1) of the TAA. This section provides, in pertinent part, that the transaction value of imported merchandise is the price actually paid or payable for the merchandise plus amounts for the items enumerated in section 402(b)(1). Buying commissions are not specifically included as one of the additions to the "price actually paid or payable." The "price actually paid or payable" is more specifically defined in section 402(b)(4)(a) as:

> The total payment (whether direct or indirect * * *) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

It is clear from the statutory language that in order to establish transaction value one must know the identity of the seller and the amount actually paid or payable to him. As stated in HRL 542141 (TAA #7), dated September 29, 1980, "* * * an invoice or other documentation from the actual foreign seller to the agent would be required to establish that the agent is not a seller and to determine the price actually paid or payable to the seller. Furthermore, the to-

tality of the evidence must demonstrate that the purported agent is in fact a bona fide buying agent and not a selling agent or an independent seller."

In order to view the relationship of the parties as a bona fide buying agency, Customs must examine all the relevant factors. *J.C. Penney Purchasing Corporation et al.* v. *United States,*, 80 Cust. Ct. 84, C.D. 4741 (1978), 451 F. Supp. 973 (1983); *United States* v. *Knit Wits (Wiley) et al.*, 62 Cust. Ct. 1008, A.R.D. 251 (1969). The primary consideration, however, "is the right of the principal to control the agent's conduct with respect to the matters entrusted to him." *Dorf Int'l Inc., et al.* v. *United States,* 61 Cust. Ct. 604, A.R.D. 245, 291 F. Supp. 690 (1968). The degree of discretion granted the agent is an important factor. *New Trends Inc.* v. *United States,* 10 CIT ——, 645 F. Supp. 957 (1986). The business ties between the manufacturer and the agent are not necessarily determinative of the status of the commissions the importer paid the agent but the question must be determined by the full circumstances as revealed by the evidence at hand. *Bushnell* v. *United States,* C.A.D. 110 (1973). The plaintiff bears the burden of proof to establish the existence of a bona fide agency relationship and that the charges paid were bona fide buying commissions. *Monarch Luggage Company, Inc.,* v. *United States,* 13 CIT ——, Slip. Op. 88–91 (1989).

The Court of International Trade in the case of *New Trends Inc.,* supra, set forth several factors upon which to determine the existence of a bona fide buying agency. These factors include: whether the agent's actions are primarily for the benefit of the importer, or for himself; whether the agent is fully responsible for handling or shipping the merchandise and for absorbing the costs of shipping and handling as part of its commission; whether the language used on the commercial invoices is consistent with the principal-agent relationship; whether the agent bears the risk of loss for damaged, lost or defective merchandise; and whether the agent is financially detached from the manufacturer of the merchandise.

The above-stated factors have been determining factors applied by the courts to deny the existence of a buying agency relationship in *New Trends, Inc.*, supra, *Jay-Arr Slimwear Inc.,* v. *United States,* —— CIT ——, Slip Op. 88–21 (1988), *Rosenthal-Netter, Inc.* v. *United States,* —— CIT ——, Slip Op. 88–9 (1988).

The services to be performed by the agent are indicative of those generally provided in a buying agency relationship. Support is provided to the bona fide nature of this relationship since the parent only purchases the merchandise pursuant to a purchase order provided by the importer. Further, the fact that the commissions are to be invoiced and paid for separately strengthen the fact that the commissions do not inure to the benefit of the manufacturer.

On the basis of the information you have provided regarding the transactions in question, if the actions of the parties conform to your letter and documentation evidencing a bona fide buyer-agent

relationship as described in TAA No. 7 is presented at the time of entry, the commission paid to the parent for the services described above will be non-dutiable buying commissions. Note however, that the degree of control asserted over the agent is factually specific and could vary with each importation. The actual determination as to the existence of a buying agency will be made by the appraising officer at the applicable port of entry.

Holding:

In view of the foregoing, it is our conclusion that the commissions to be paid to the prospective company to perform the services of assisting in the purchase of the merchandise from the foreign manufacturers are to be considered bona fide buying commissions as long as the considerations discussed above are followed.

(C.S.D. 90–57)

Classification: Tariff and quota status of, and country of origin marking requirements applicable to peanut products.

Date: February 23, 1990
File: HQ 555062
CLA–2–CO:R:C:V 555062 CW
Category: Classification

MR. W. CLAYTON HOLTON, JR.
AGRI-BUSINESS SUPPLY INC.
1102 Third Avenue
Albany, Georgia 31709

Re: Tariff and quota status of, and country of origin marking requirements applicable to, peanut products made in Puerto Rico from peanuts grown in CBERA countries, and peanut butter made in the U.S. Virgin Islands from peanuts grown in Argentina.

DEAR MR. HOLTON:

This is in response to your letter of June 14, 1988, requesting a ruling regarding the eligibility for duty-free entry under the Caribbean Basin Economic Recovery Act (CBERA) of peanut products made in a bonded warehouse in Puerto Rico from peanuts grown in CBERA beneficiary countries (BC's). Your subsequent letter of October 31, 1988, asks whether peanut butter made in the U.S. Virgin Islands (V.I.) from peanuts grown in Argentina may receive duty-free treatment under General Note 3(a)(iv), Harmonized Tariff Schedule of the United States (HTSUS). You also inquire as to whether the peanuts and peanut products will be subject to quota upon arrival in the U.S., and the applicability of country of origin

marking requirements to the peanut products. We regret the delay in responding to your requests.

Facts:

You plan to establish a peanut product manufacturing plant in a bonded warehouse in Puerto Rico to process raw inshell or shelled peanuts from BC's. The raw peanuts will be processed in the bonded warehouse into "roasted or seasoned kernels" and peanut butter. You also intend to import raw shelled peanuts from Argentina into the V.I. for use in the manufacture of peanut butter, which will be imported into the U.S. According to your October 31, 1988, letter, the value of the peanuts from Argentina will not represent more than 70 percent of the full value of the imported peanut butter, and the other ingredients (sugar, vegetable oil, molasses, and salt) will be purchased from U.S. sources.

Issues:

1. Whether peanut products made in a bonded warehouse in Puerto Rico from peanuts grown in BC's are entitled to duty-free treatment under the CBERA when withdrawn from the warehouse.
2. Whether peanut butter made in the V.I. from peanuts grown in Argentina is entitled to duty-free treatment under General Note 3(a)(iv), HTSUS.
3. Whether the peanut butter imported from the V.I. and the peanut products withdrawn for consumption in Puerto Rico are subject to country of origin marking requirements.
4. Whether the peanuts and peanut products imported into the U.S. are subject to quota.

Law and Analysis:

I. *Applicability of CBERA to Peanut Products Made in Puerto Rico:*

Under the CBERA, eligible articles the growth, product, or manufacture of a BC which are imported directly to the U.S. from a BC qualify for duty-free treatment, provided the sum of (1) the cost or value of materials produced in a BC or two or more BC's, plus (2) the direct costs of processing operations performed in a BC or countries is not less than 35% of the appraised value of the article at the time it is entered. An eligible article is considered to be a "product of" a BC if it is either wholly the growth, product, or manufacture of a BC or a new or different article of commerce which has been grown, produced, or manufactured in the BC. *See* section 10.195(a)(1), Customs Regulations (19 CFR 10.195(a)(1)).

For purposes of satisfying the 35% value-content requirement, 19 CFR 10.195(b) provides that the term "BC" includes Puerto Rico. Moreover, the cost or value of materials incorporated in the final article which are produced in the customs territory of the U.S., excluding Puerto Rico, may be included in the 35% value-content calculation, but in an amount not to exceed 15% of the appraised value of the article at the time it is entered. *See* 19 CFR 10.195(c).

In regard to the facts of this case, the peanuts imported into Puerto Rico clearly satisfy the "product of" requirement as they are "wholly the growth, product, or manufacture" of a BC. Concerning the 35% requirement, the entire cost or value of the peanuts may be included in this value-content calculation as they are considered "materials produced in a" BC or countries. *See* section 10.196(a), Customs Regulations (19 CFR 10.196(a)). Moreover, the direct costs of processing incurred in Puerto Rico to produce the peanut products, and the cost or value of U.S. origin ingredients (subject to the 15% cap on U.S. materials) may be applied toward the 35% value-content minimum. Please note that section 10.197, Customs Regulations (19 CFR 10.197), describes in detail those costs which are and are not considered direct costs of processing operations.

Although no cost information has been provided regarding these peanut products, there appears to be no question that, under the described circumstances, the peanut products to be withdrawn from the bonded warehouse in Puerto Rico will satisfy the 35% requirement. Therefore, assuming that the peanuts are imported directly to Puerto Rico from a BC, the peanut products will be entitled to duty-free treatment under the CBERA. We have enclosed for your information a copy of the Customs Regulations relating to the CBERA.

II. *Applicability of General Note 3(a)(iv), HTSUS, to Peanut Butter Made in the V.I. from Peanuts Grown in Argentina:*

Under General Note 3(a)(iv), HTSUS, goods imported from an insular possession (including the V.I.) may enter the customs territory of the U.S. free of duty if they:

1. Are manufactured or produced in the possession;
2. Do not contain foreign materials which represent more than 70% of the goods' total value (or more than 50% with respect to articles ineligible for CBERA treatment); and
3. Are imported directly to the customs territory of the U.S. from the possession.

Materials imported into an insular possession, as in this case, become a product or manufacture of that possession only if they are substantially transformed there into a new and different article of commerce. A substantial transformation occurs when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing. *See Texas Instruments, Inc.* v. *United States,* 69 CCPA 152, 681 F.2d 778 (1982).

In regard to the facts presented here, the processing in the V.I. of the raw peanuts from Argentina and the other ingredients from the U.S. clearly results in a substantial transformation of those materials into a new and different article of commerce—peanut butter. Therefore, the peanut butter would be considered the product or

manufacture of the V.I for purposes of General Note 3(a)(iv), HTSUS.

Consequently, if, as you maintain, the cost or value of the peanuts from Argentina do not represent more than 70% of the appraised value of the peanut butter imported into the U.S., the peanut butter would be entitled to duty-free treatment under General Note 3(a)(iv), HTSUS. This assumes that the merchandise is imported directly to the U.S. from the V.I. and that the documentation requirements set forth in section 7.8, Customs Regulations (19 CFR 7.8), copy enclosed, are met.

III. *Applicability of Country of Origin Marking Requirements to the Peanut Products Entered or Withdrawn for Consumption:*

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) generally provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked to indicate the English name of the country of origin. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)) defines "country of origin" as "the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin within the meaning of Part 134."

For purposes of 19 CFR 134.1(b), a substantial transformation occurs when an article loses its identity and becomes a new article having a new name, character or use. *See Gibson-Thomsen Co.*, 27 C.C.P.A. 267 at 270 (1940), *National Juice Products Association* v. *United States*, 10 CIT 18, 628 F. Supp. 978 (1986), *Koru North America* v. *United States*, 12 CIT ——, 701 F. Supp. 229 (1988).

In this case, the manufacture of peanuts into peanut butter clearly constitutes a substantial transformation within the meaning of 19 CFR 134.1(b). In addition to the name change, the character and use for the two products are entirely different. Although peanut butter is made from peanuts and has the taste of peanuts, the similarity ends there. The products look different, have different consistencies and are used for different purposes; peanut butter as a spread and peanuts as food to "munch" on. These are clearly different articles of commerce. Accordingly, the country of origin of the imported product is the country where the peanut butter is made.

In the case of the peanut butter produced in the V.I. from peanuts grown in Argentina, for purposes of 19 U.S.C. 1304, the country of origin is the V.I. However, products of possessions of the U.S. are excepted from marking under section 134.32(1), Customs Regulations (19 CFR 134.32(1)). Since the V.I. is a U.S. possession, no country of origin marking is necessary on the peanut butter. Whether or not the peanut butter can be marked with a "Made in

U.S.A." label is a determination to be made by the Federal Trade Commission, not the Customs Service. We suggest you contact that agency for a determination.

Similarly, with regard to the peanut butter produced in a bonded warehouse in Puerto Rico from peanuts grown in BC's, no country of origin marking is required. Section 134.13, Customs Regulations (19 CFR 134.13), provides that with respect to articles repacked in a bonded warehouse, they should be marked with the name of the country of origin at the time the article is withdrawn for consumption unless the article and its container are otherwise exempt from marking. Since the peanuts will be substantially transformed into peanut butter in the bonded warehouse in Puerto Rico, the origin of the peanut butter at the time of withdrawal from warehouse for consumption is Puerto Rico. However, the requirements of 19 U.S.C. 1304 apply only to articles of foreign origin, *i.e.*, a country of origin other than the U.S. or its possessions and territories (19 CFR 134.1(c)). Since Puerto Rico is a territory or possession of the U.S., it is not subject to the requirements of 19 U.S.C. 1304.

In regard to the "roasted or seasoned kernels" produced in a bonded warehouse in Puerto Rico from peanuts grown in BC's, we are unable to determine from the information provided whether this product is subject to the requirements of 19 U.S.C. 1304. To make this determination, we require more detailed descriptive information concerning this product and the processing performed in the bonded warehouse. Again, we suggest that you contact the Federal Trade Commission as to whether the peanut products produced in the bonded warehouse may be marked "Made in U.S.A."

IV. *Applicability of Quota Restrictions to Peanuts and Peanut Products Imported into the U.S.:*

Peanuts entered or withdrawn for consumption in the customs territory of the U.S. (which includes Puerto Rico) are subject to quota. However, peanut butter is not subject to quota. Therefore, in regard to peanuts imported into Puerto Rico and processed in a bonded warehouse there, quota restrictions would apply only if peanuts are withdrawn for consumption from the bonded warehouse. Although additional descriptive information is required concerning the "roasted or seasoned kernels" produced in the bonded warehouse, it appears that this product would be classifiable in the tariff provision encompassing peanuts, thereby rendering the product subject to quota when withdrawn for consumption. The peanut butter withdrawn from the bonded warehouse in Puerto Rico and the peanut butter imported into the U.S. from the V.I. clearly would not be subject to quota.

The V.I. is not part of the customs territory of the U.S. Therefore, products imported into that U.S. possession are not subject to U.S. quotas administered by this agency. For information regarding restrictions on goods imported into the V.I., we suggest that you con-

tact the District Director of Customs, Main Post Office, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00801.

Holding:

Based on the information presented, the peanut products produced in a bonded warehouse in Puerto Rico from peanuts grown in BC's are entitled to duty-free treatment under the CBERA. Peanut butter produced in the V.I. from peanuts grown in Argentina is entitled to duty-free treatment under General Note 3(a)(iv), HTSUS, assuming compliance with the 70% foreign material value limitation. The peanut butter imported into the U.S. from the V.I. and the peanut butter withdrawn from the bonded warehouse in Puerto Rico are not subject to quota or the country of origin marking requirements of 19 U.S.C. 1304.

(C.S.D. 90–58)

Classification: The applicability of subheadings 9801.00.10, 9802.00.50, and 9802.00.80 HTSUSA, and country of origin marking requirements to greeting cards.

Date: February 21, 1990
File: HQ 555213
CLA–2 CO:R:C:V 555213 DBI
Category: Classification
Tariff No.: 9801.00.10, 9802.00.50, 9802.00.80, HTSUS;

DAWN ROE JOHNSON, ESQ.
LEGAL DEPARTMENT
HALLMARK CARDS, INC.
P.O. Box 419126
Kansas City, Missouri 64141–6126

Re: Applicability of subheadings 9801.00.10, 9802.00.50, and 9802.00.80, HTSUS, and country of origin marking requirements to greeting cards sent to Mexico for folding and/or gluing operations.

DEAR MS. JOHNSON:

This is in response to letters dated December 12 and 22, 1988, from William R. Stein, Esq., requesting a ruling on behalf of Hallmark Cards, Inc. concerning the applicability of item 800.00 or 807.00, Tariff Schedules of the United States (TSUS), to certain greeting cards that will be shipped to Mexico for folding and/or gluing and packaging operations. Mr. Stein also asked whether the returned cards may properly be marked "made in the U.S.A." He requested that we direct our ruling to you.

Facts:

Counsel advises that your company manufactures gr ɔting cards in the U.S. and often purchases components of the cards from U.S. vendors. Your company plans to ship cards, components of the cards and matching envelopes to Mexico for some final work which will include one or more of the following operations:

(1) folding;
(2) gluing a piece of paper to itself;
(3) affixing permanent paper or non-paper attachments to paper cards; and
(4) affixing non-permanent paper or non-paper attachments to paper cards.

Counsel states that in a small number of cases, the cards and/or attachments will be printed and die cut in the U.S. and shipped to Mexico in large sheets to protect the paper during shipment. In those situations, the excess paper must be removed by hand in Mexico prior to the above operations.

When the operations are completed, several cards, along with the matching envelopes are inserted into plastic packs. The packs are then packed in cartons for shipment to the U.S. for distribution and sale.

Issues:

(1) Whether the described greeting cards, when returned to the U.S., will be eligible for the exemption from duty in subheading 9801.00.10, Harmonized Tariff Schedule of the United States (HTSUS) (formerly item 800.00, TSUS), or the partial exemption from duty in subheading 9802.00.50 or 9802.00.80, HTSUS (formerly items 806.20 and 807.00, TSUS, respectively).

(2) Whether the returned cards are subject to country of origin marking requirements.

Law and Analysis:

As you are probably aware, the HTSUS replaced the TSUS on January 1, 1989. Item 800.00, TSUS, was carried over into the HTSUS without change as subheading 9801.00.10. This provision provides for the free entry of articles of U.S. origin which are returned without having been advanced in value or improved in condition while abroad.

Counsel cites several court cases and administrative rulings in support of the contention that minor processing operations, such as those involved here, performed abroad on domestic articles do not disqualify those articles from duty-free entry under subheading 9801.00.10, HTSUS. However, the "processing" involved in those cases and rulings almost exclusively related to packaging or repackaging operations. In *John V. Carr & Sons, Inc.* v. *United States,* 69 Cust. Ct. 78, C.D. 4377 (1972), *aff'd,* 61 CCPA 52, C.A.D. 1118 (1974), the court held that absent some alteration or change in the *articles*

themselves, the mere sorting and repackaging of the goods were not sufficient to preclude classification as returned American products.

In the instant case, although the greeting cards will be subjected to packaging operations in Mexico, they also will be subjected to other operations (*i.e.*, folding and/or gluing or taping) which, although they may be considered minor, will result in a change or alteration in the articles themselves. In our opinion, these additional operations clearly advance the value and improve the condition of the cards. Therefore, the cards will not be entitled to free entry under subheading 9801.00.10, HTSUS.

Item 807.00, TSUS, was carried over into the HTSUS without change as subheading 9802.00.80, HTSUS. This provision applies to articles assembled abroad in whole or in part of fabricated components, the product of the U.S., with no operations performed thereon except the attachment of the components to form the imported merchandise and operations incidental thereto. An article classified under subheading 9802.00.80, HTSUS, is subject to duty upon the full appraised value of the imported article, less the cost or value of such products of the U.S. Section 10.16(a), Customs Regulations (19 CFR 10.16(a), provides in regard to this tariff provision that the assembly operations performed abroad may consist of any method used to join or fit together solid components, such as gluing, sewing, or the use of fasteners. Section 10.16(b), Customs Regulations (19 CFR 10.16(b)), states that operations incidental to the assembly process, whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption.

In the present case, the affixing of paper or non-paper attachments to paper cards through gluing or taping is considered an acceptable assembly operation under 19 CFR 10.16(a). Therefore, those cards subjected to this operation in Mexico will be entitled to classification under subheading 9802.00.80, HTSUS. Moreover, as 19 CFR 10.16(b) specifically states that the folding of assembled articles is considered incidental to the assembly process, the folding of greeting cards to which attachments have been affixed will not preclude the application of this tariff provision.

Counsel indicates that in a few instances, cards and/or paper attachments will be printed and die cut in the U.S. and then shipped to Mexico in large sheets where the paper will be separated by hand along the pre-cut lines and the excess paper discarded. This will precede the folding and/or gluing operations. In our opinion, separating paper cards and attachments along pre-cut lines and disposing of the excess paper may be considered incidental to the process of assembling attachments to the paper cards and will not render the assembled cards ineligible for subheading 9802.00.80, HTSUS, treatment. In this regard, *see United States* v. *Texas Instruments, Inc.*, 64 CCPA 24, C.A.D. 1178, 545 F.2d 739 (1976) (scoring and breaking silicon slices along pre-marked "streets" to separate indi-

vidual transistor chips prior to their assembly into finished transistors constitutes an incidental assembly operation).

However, we believe that the gluing of paper to itself does not constitute an acceptable assembly operation. 19 CFR 10.16(a) states that the assembly operations performed abroad may consist of any method used to join or fit together solid components. This regulation further provides that the combining of liquids, chemicals, and amorphous solids with each other or with solid components is not regarded as an assembly. In a recent court case, *L'Eggs Products, Inc.* v. *United States*, 10 CIT ——, 704 F. Supp. 1127 (1988), it was held that the joining of fabric to itself by sewing constituted an acceptable assembly operation as it involved two separate solid components—the fabric and thread. However, as glue is not a solid, it cannot qualify as a fabricated component for purposes of subheading 9802.00.80, HTSUS. Therefore, no allowance in duty may be made under this tariff provision for the value of U.S. paper that is exported to Mexico and glued to itself.

Moreover, where a greeting card is exported and merely folded abroad, this clearly would not qualify as an acceptable assembly operation under 19 CFR 10.16(a). However, we believe that greeting cards that are merely folded and packaged abroad would be entitled to classification under subheading 9802.00.50, HTSUS, which applies to articles that are returned to the U.S. after having been exported for repairs and alterations. Articles entitled to treatment under this tariff provision are dutiable only upon the cost or value of the foreign repairs or alterations, assuming compliance with the documentation requirements of section 10.8, Customs Regulations (19 CFR 10.8).

With regard to the country of origin marking requirements, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) generally provides that all articles of foreign origin (or their containers) imported into the U.S. are required to be legibly, conspicuously and permanently marked to indicate the country of origin to an ultimate purchaser in the U.S. For purposes of this statute, "country of origin" means the country of manufacture, product or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

Products of the U.S. are not subject to these marking requirements. Since further work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin, a U.S. product sent to another country for mere processing or assembly, which is not substantially transformed in that country, remains a product of the U.S. and is not required to be marked upon its return. However, an exception to this is set forth in section 10.22, Customs Regulations (19 CFR 10.22). Section 10.22 provides that articles assembled in

whole or in part from U.S. components which are entitled to entry under subheading 9802.00.80, HTSUS (formerly item 807.00, TSUS), are considered products of the country of assembly for purposes of 19 U.S.C. 1304, whether or not the assembly constitutes a substantial transformation.

In the case at hand, we find that none of the cards will undergo a substantial transformation in Mexico. Customs has previously held that operations performed on greeting cards, such as pressing out, folding and gluing, are minor and do not constitute a substantial transformation. *See* HQ 728269, dated July 29, 1985. However, Customs has also determined that while such assembly operations performed in another country do not substantially transform the greeting cards into products of that country, if the cards are being entered into the U.S. under subheading 9802.00.80, HTSUS, then 19 CFR 10.22 requires that they be considered products of the country of assembly and marked accordingly. *See* HQ 729758, dated February 22, 1988. Consequently, in this case, we find that while the affixing of permanent and non-permanent attachments through gluing and taping performed in Mexico does not substantially transform the greeting cards into products of Mexico, those cards described above which are receiving partial exemption from duty under subheading 9802.00.80, HTSUS, are considered to be products of Mexico pursuant to 19 CFR 10.22. Since the cards are made entirely of American-made materials, the U.S. origin of the material may be disclosed by using: "Assembled in Mexico from material of U.S. origin," or some similar phrase.

With regard to use of the phrase "Made in the U.S.A." on the remaining cards, we suggest you contact the Federal Trade Commission, Division of Enforcement, 6th and Pennsylvania Avenue, NW, Washington, D.C. 20580. That agency enforces the various labeling laws regarding the use of that phrase.

Holding:

Based on the information submitted, we are of the opinion that the folding and/or gluing or taping operations to be performed abroad will advance the value and improve the condition of the greeting cards, thereby precluding duty-free entry of the cards under subheading 9801.00.10, HTSUS. However, cards to which attachments are affixed by gluing or taping will be entitled to the partial duty exemption under subheading 9802.00.80, HTSUS, upon compliance with the documentation requirements of 19 CFR 10.24. Cards assembled in this manner will not be rendered ineligible for treatment under this tariff provision by being subjected to incidental assembly operations, such as separating paper cards and attachments along pre-cut lines prior to assembly and folding the cards after assembly. However, no allowance in duty may be made under subheading 9802.00.80, HTUS, for the value of U.S. paper that is glued to itself. Cards which are merely folded and packaged abroad

will be entitled to the partial duty exemption provided for in subheading 9802.00.50, HTSUS, assuming compliance with the documentation requirements of 19 CFR 10.8.

Additionally, those greeting cards assembled in Mexico and entitled to entry under subheading 9802.00.80, HTSUS, will be considered products of Mexico pursuant to 19 CFR 10.22 and must be marked accordingly. However, because the operations to be performed abroad will not effect a substantial transformation, those cards classified other than in subheading 9802.00.80, HTSUS, will remain products of the U.S. and will not be subject to country of origin marking requirements.

(C.S.D. 90–59)

Classification: The applicability of partial duty exemption under HTSUS subheading 9002.00.80 to bows formed in Mexico and attached to footwear.

Date: February 16, 1990
File: HQ 555357
CLA–2 CO:R:C:V 555357 KAC
Category: Classification
Tariff No.: 9802.00.80

MR. WILLIAM D. OUTMAN, II
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Re: Applicability of partial duty exemption under HTSUS subheading 9802.00.80 to bows formed in Mexico and attached to footwear.

DEAR MR. OUTMAN:

This is in response to your letter of March 30, 1989, on behalf of R.G. Barry Corporation, requesting a ruling on the applicability of subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS) (formerly item 807.00, Tariff Schedules of the United States (TSUS)), to U.S. ribbon formed into bows in Mexico and attached to footwear. We regret the delay in responding to your request.

Facts:

You state that the ribbon used in the formation of the bows will be of U.S. origin. The U.S. ribbon, in varying widths, from ¼ inch to ⅞ inch, will be exported to Mexico on spools. The ribbon will be unspooled and cut to length using the "Ace Hot Knife Strip Cutter." The cut ribbon is then placed on a bow maker machine, threaded around hooks and, with a press of the footswitch, it is formed into a

bow which is tied to itself. Later, the bow will be tacked to footwear which is imported into the U.S.

Issue:

Whether the formation of the bow constitutes an acceptable assembly operation or operation incidental to assembly for purposes of HTSUS subheading 9802.00.80.

Law and Analysis:

HTSUS subheading 9802.00.80 provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

All three requirements of HTSUS subheading 9802.00.80 must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full value of the imported assembled article, less the cost or value of such U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (10 CFR 10.24).

The assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners. *See,* section 10.16(a), Customs Regulations (19 CFR 10.16(a)).

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operation, although they may precede, accompany or follow the actual assembly operation. 19 CFR 10.16(a). Examples of operations considered incidental to the assembly process are delineated at 19 CFR 10.16(b). However, any significant process, operation, physical or chemical improvement of a component precludes the application of the exemption under HTSUS subheading 9802.00.80.

We have previously held that cutting U.S. ribbon to appropriate lengths abroad, forming one or more pieces of ribbon into the shape of a bow, and then tying the center of the bow with coated or tinsel wire to secure the bow shape constitutes an acceptable assembly or operation incidental to assembly under subheading 9802.00.80, HTSUS, or item 807.00, TSUS. *See,* Headquarters Ruling Letters 071450 dated September 8, 1983, 553674 dated June 14, 1985, 554956 dated April 6, 1988, and 554943 dated April 18, 1988. We have also held in Headquarters Ruling Letter 555475 dated November 3, 1989, that ribbon cut to length, wrapped twice around the

middle of a coat hanger bar and base of a hanger hook, and knotted into a bow qualified as an assembly operation or operations incidental to assembly. In each of these cases, the bow formation process involved the joinder of two or more components. The ribbon's bow shape was secured either by tying wire around its center or by wrapping and knotting the ribbon to the hanger.

In the present case, it is clear that the formation of the ribbon into a bow by knotting the ribbon is not, in itself, an assembly operation. This case is distinguishable from the above-cited rulings as the single length of ribbon is the sole component which is knotted to form a bow. There is no joinder of two or more separate components as required by HTSUS subheading 9802.00.80.

Moreover, concerning the subsequent tacking of the completed bow to the footwear, we are of the opinion that the ribbon is not exported in condition ready for assembly without further fabrication. The ribbon after being cut to its designated length is placed on the bow maker machine which shapes the ribbon into a bow and secures the bow by knotting the ribbon to itself. We find that the decision rendered in *Samsonite Corporation* v. *United States,* Slip Op. 88–166, 12 CIT ——, 702 F. Supp. 908 (CIT 1988), *aff'd,* Appeal No. 89–1346 (CAFC November 16, 1989), 24 Cust. Bull. 23 (January 31, 1990), is controlling. In ruling that straight steel strips, which were sent abroad for bending into a squared "C" shape and then assembled into luggage, were not exported in condition ready for assembly without further fabrication, the court

> [f]ound that the "bending process" to which the strips wee subjected "did more than 'adjust' the article. The process created the component to be assembled, the essence of which is its configuration."

The operation of forming the ribbon into the bow on the bow maker machine, in effect, does more than adjust the ribbon. The formation operation creates the bow which later will be tacked on to the footwear. The assembly of the bow with the footwear cannot take place until the ribbon has been formed into the shape of a bow, the configuration of which is the essence of the component to be assembled. Thus, the complete change in shape from ribbon to bow is a significant process and cannot be considered an operation incidental to assembly. As the ribbon does not meet the requirement of clause (a) of HTSUS subheading 9802.00.80, no allowance in duty can be made for the cost or value of the U.S. ribbon.

Holding:

From the information presented, we conclude that the formation of a single length of U.S. ribbon into a bow which is knotted to secure its shape is not an acceptable assembly operation, but rather is further fabrication of the exported ribbon. Therefore, the U.S. ribbon will not qualify for the partial duty exemption of HTSUS subheading 9802.00.80.

(C.S.D. 90–60)

Marking: The country of origin marking of imported plastic cosmetic compacts.

Date: February 14, 1990
File: HQ 731863
MAR–2–05 CO:R:C:V 731863 KG
Category: Marking

MR. MARK FEIGENBAUM
FINELLE COSMETICS
P.O. Box 5200
137 Marston Street
Lawrence, MA 01842–2808

Re: Country of origin marking of imported plastic cosmetic compact.

DEAR MR. FEIGENBAUM:

This is in response to your letter of October 3, 1988, requesting a country of origin ruling regarding future importations of imported plastic cosmetic compacts. We regret the delay in responding to your inquiry.

Facts:

The slimline plastic cosmetic compact is imported empty and filled in the U.S. with powdered blush made in the U.S. The sample plastic compact you submitted for examination has the name "finelle" on the top of the compact. Inside the compact, there is a mirror on one side and a tray on the other side, in which the blush and a applicator brush are placed. The size of the compact is about 3½ inches by 2½ inches.

The compacts are imported for the sole purpose of being filled and are not sold empty. Further, no cosmetic refills are sold by you nor are they available in the marketplace for these compacts. After the blush is fully used up, a consumer who desired more blush would have to buy a new compact complete with mirror, blush and applicator.

Issue:

Whether imported plastic cosmetic compacts which are filled in the U.S. with powdered blush must be marked with the country of origin of the compact.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru*

North America v. *United States*, 701 F. Supp. 229, 12 CIT —— (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States* v. *Friedlaender & Co.*, 27 CCPA 297, 302 C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

An exception from the requirement that the imported article be marked is authorized by 19 U.S.C. 1304(a)(3)(D) if the marking of a container of the article will reasonably indicate the origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.24(c)(1), Customs Regulations (19 CFR 134.24(c)(1)), provides that when disposable containers or holders are imported by persons or firms who fill or package them with various products which they sell, these persons or firms are the ultimate purchasers of these containers or holders and they may be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D). The outside wrappings or packages containing the containers shall be clearly marked to indicate the country of origin.

In HQ 722170 (July 18, 1983), and HQ 722547 (August 30, 1983), Customs ruled that plastic cosmetic compacts were required to be individually marked. Customs reconsidered its position on marking compacts in HQ 723905 (March 20, 1984). In that ruling, Customs affirmed its view that plastic compacts imported empty to be filled in the U.S. with U.S. made cosmetics were not disposable containers subject to 19 CFR 134.24(c)(1) because compacts are not merely containers, but rather are substantial, functional articles in their own right. As support for this position, Customs cited rulings classifying compacts as "flat goods" under item 706.60 (706.61) of the Tariff Schedules of the United States (TSUS) rather than "containers * * * chiefly used for he packing, transporting or marketing of merchandise" under item 772.70, TSUS.

Customs does not regard the sample presented in this case as a substantial, functional article in its own right. It is not reasonable to assume that a retail purchaser would buy the finished product for the compact. Although plastic compacts could be refilled, this company does not sell refills and refill blush for this particular compact is not available in the marketplace. When the blush is used up, the consumer would dispose of the compact and buy a new compact containing blush. As offered in the market, this compact is a disposable container imported empty to be filled in the U.S. Therefore,

this item is subject to 19 CFR 134.24(c)(1) which excepts the compact from individual marking and only requires that the container in which the compacts are imported be marked with the country of origin of the compacts.

Further, on January 1, 1990, the Harmonized Tariff Schedule of the United States ("HTSUS") superseded and replaced the TSUS. Plastic cosmetic compacts are now classified under subheading 3923.10.0000, HTSUS, which provides for plastic articles for the conveyance or packing of goods, of plastics, boxes, cases, crates and similar articles. *See* HQ 084714 (July 19, 1989). Since plastic compacts are now classified as containers, the justification for our prior position is no longer valid.

Holding:

Plastic cosmetic compacts for which refill cosmetics are not available are disposable containers and when imported empty, are subject to the marking exception provided in 19 CFR 134.24(c)(1). Therefore, the compact itself is excepted from marking and only the container in which the compact is imported must be marked with the country of origin of the compact. Customs rulings HQ 723905, HQ 722547 and HQ 722170 are modified to conform with this position.

(C.S.D. 90–61)

Marking: The country of origin of imported sewer cap castings and gate valves.

Date: February 27, 1990
File: HQ 731937
MAR–2–05 CO:R:C:V 731937 KG
Category: Marking

ROBERT SLOMOVITZ
CHIEF, NATIONAL IMPORT SPECIALIST BRANCH 1
New York Seaport
New York, N.Y.

Re: Country of origin marking of imported sewer cap castings and gate valves

DEAR MR. SLOMOVITZ:

This is in response to your undated memorandum (IA 88/10, CLA–2–06:S:N:N1:115–31), referred to your office by Customs in San Diego requesting internal advice regarding the country of origin marking of imported sewer cap castings and gate valves.

Facts:

Imported sewer cap cast iron castings and gate valves were marked with the country of origin on the bottom portion. Although no description of a sewer cap cast iron casting was provided, a sewer cap is not a manhole cover, assembly or frame. Many of the castings are marked "SEWER O.M." or "WATER O.M." It is contended that the initials O.M. is an abbreviation of an area in San Diego called Otay Mesa, a known geographical area.

Issues:

Whether sewer cap cast iron castings and gate valves are within the scope of 19 U.S.C. 1304(e).

Whether the initials "O.M." are a locality in the U.S. for the purposes of 19 CFR 134.46.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru North America* v. *United States,* 701 F. Supp. 229, 12 CIT —— (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States* v. *Friedlaender & Co.,* 27 CCPA 297, 302 C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Section 207 of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2976 (1984) added a new 19 U.S.C. 1304(e), which requires that imported manhole rings, frames, covers and assemblies thereof be marked with the country of origin on the top surface by means of die stamping, cast-in-mold lettering, etching, or engraving. Both the Senate Report, S. Rep. No. 98–308, and the House Conference Report state that section 207 is intended to cover imported pipe, pipe fittings, compressed gas cylinders, and manhole rings or frames, covers, and assemblies thereof. There is no mention in the legislative history of section 207 of any intent to cover sewer

caps or gate valves. Because section 207 does specifically enumerate certain items rather than a general category of items, it is assumed that Congress intended for this provision to only cover those specifically enumerated items. Section 207 will be construed narrowly to only apply to manhole covers, frames and assemblies thereof.

Since sewer caps and gate valves are not specifically listed in section 207, these items are subject to the general marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134. Pursuant to section 134.41, Customs Regulations (19 CFR 134.41), the marking must be legible, permanent and conspicuous. The term "ultimate purchaser" is defined in section 134.1(d), Customs Regulations (19 CFR 134.1(d)), as generally the last person in the U.S. who will receive the article in the form in which it was imported." Further, 19 CFR 134.1(d)(3) states that if an article is to be sold at retail in its imported form, the purchaser at retail is the ultimate purchaser.

Although no information was provided concerning the use of the imported sewer caps and gate valves, if they are purchased by and for the use of a municipality or other local government agency, such municipality or agency would be the last person in the U.S. to receive them in the form in which they were imported and the ultimate purchaser of these items for the purposes of 19 U.S.C. 1304. Although citizens of the municipality pay taxes which ultimately are used to pay for all municipal purchases, citizens are not involved in the purchasing decision. The purpose of the marking statute, as stated above, is the assist people in making informed buying choices. Once the purchase transaction is completed by the fully informed purchaser, the goal of 19 U.S.C. 1304 is accomplished. Since the ultimate purchaser in this case is the local government authority responsible for purchasing sewer caps and gate valves, there is no need to mark the top of these items. As long as the ultimate purchaser is informed of the country of origin in a permanent and conspicuous manner, 19 CFR 134.41 is satisfied.

The second issue presented involves section 134.46, Customs Regulations (19 CFR 134.46), which requires that when the name of any city or locality in the U.S. appears on an imported article or its container, that the name of the country of origin preceded by the phrase "Made In," "Product of," or other words of similar meaning appear legibly, permanently, in close proximity, and in comparable size. In a similar case, Custom ruled in HQ 729378 (May 2, 1986), that the letters "KC MO", an abbreviation for Kansas City, Missouri, marked on a manhole cover did indicate a locality in the U.S. thereby triggering the requirements of 19 CFR 134.46. However, the issue you raised involves an abbreviation referring to a local water or sewer district which would not be readily associated with a well known locality. Therefore, the letters "O.M.", which are an abbreviation for a local water or sewer authority, does not trigger the requirements of 19 CFR 134.46.

Holding:

Imported sewer cap cast iron castings and gate valves are not subject to the special marking requirements of 19 U.S.C. 1304(e). The ultimate purchaser of a sewer cap or gate valve is the local government purchasing authority responsible for ordering these parts. Therefore, there is no need to mark the top surface of the imported sewer cap castings and gate valves. The letters "O.M." on a sewer cap, which refers to Otay Mesa, a local water or sewer authority, does not trigger 19 CFR 134.46.

(C.S.D. 90–62)

Marking: The country of origin marking of an adjustable wrench.

Date: February 16, 1990
File: HQ 732259
MAR–2–05 CO:R:C:V 732259 EAB
Category: Marking

RODNEY O. THORSON
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005–2107

Re: Country of origin marking of adjustable wrench made from imported and domestic components

DEAR MR. THORSON:

This is in reply to your letter of March 24, 1989, on behalf of The Stanley Works, requesting a ruling on the country of origin marking requirements of adjustable wrenches made from two imported components and three U.S. components. We regret the delay in responding.

Facts:

The wrench consists of an imported frame and adjustable jaw, and a domestic knurl, spring and pin. After importation, the frame and adjustable jaw are machined to approximate dimensional standards in a series of metal cutting operations. A channel is cut in the frame to provide access for the movable part of the jaw. A barrel area side hole is broached in the frame to accommodate the domestic knurl. A hole is drilled to accommodate the domestic pin that holds the knurl in the frame. The frame is deburred, then permanently marked with the size, model number and brand name in compliance with ANSI/ASME product specifications. Separately, the adjustable jaw is broached on the active jaw face and at the barrel area, and teeth are cut to accommodate the knurl.

The articles are subjected to recrystallization annealing in a furnace at 1600° F. for 40 minutes, then cooled in an oil bath to set its new molecular structure so as to harden and strengthen it. The wrench is washed and tempered to meet further ANSI/ASME standards. It is smoothed to remove scale and rough edges to prepare it for chrome plating to inhibit corrosion. Assembly of the frame, adjustable jaw, knurl, tension spring and pin completes the manufacturing of the adjustable wrench.

As described above, your client makes adjustable wrenches in 4, 6, 8, 10 and 12 inch lengths. You provide cost analyses for each wrench, and we note that the cost of the imported frame and adjustable jaw for the 4" wrench is 16% of the total manufactured cost; the cost of the 12" wrench is 34% of the total manufactured cost.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The primary purpose of the country of origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy the product, if such marking should influence his will." *United States* v. *Friedlaender & Co.*, 27 CCPA 297 (1940); *National Juice Products Association* v. *United States*, 10 CIT 48, 628 F. Supp. 978 (1986).

An exception of an article from marking is specifically provided in 19 U.S.C. 1304(a)(3)(D), if the marking of a container of such article will reasonably indicate the origin of such article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), defines the ultimate purchaser as generally the last person in the U.S. who will receive the article in the form in which it was imported. However, Section 134.35, Customs Regulations (19 CFR 134.35), provides that articles used in the U.S. in manufacture which results in articles having a name, character or use differing from that of the imported articles will be within the principle of the decision in the case of *United States* v. *Gibson-Thomsen Co., Inc.*, 27 CCPA 267 (1940). Under this principle, the manufacturer in the U.S. who converts or combines the imported article into a different article will be considered the ultimate purchaser for purposes of meeting the general requirement of 19 U.S.C. 1304(a).

If the manufacturing process is merely a minor one leaving the identity of the imported article intact, the consumer or user of the article who obtains the article after the processing will be regarded

as the ultimate purchaser, 19 CFR 134.1(d)(2). In the case of socket wrench components imported fully machined, Customs has found that finishing operations including heat treating; grinding, vibrating and polishing; plating; assembly; and inspection and identification marking were not a substantial transformation within the meaning of 19 CFR 134.35. Accordingly, the processor was not considered the ultimate purchaser of the imported components, T.D. 74–12(3), November 1, 1973, favorably commented upon in Headquarters Ruling 711320, March 6, 1981. *See also* Headquarters Ruling 729516, May 12, 1986: "The final identity and character of the finished tools are established by the manufacturing operations performed in Japan. Although the further processing in the U.S. is essential to finishing the imported items, the processing results in neither a loss of identity nor a new and different product having a new name, character or use."

While mere finishing operations are insufficient to constitute a substantial transformation, if an imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation of the article. A substantial transformation occurs when an article loses its identity and becomes a new article having a new name, character, or use, *see United States* v. *Gibson-Thomsen,* 27 CCPA 267 (1940) and *National Juice Products Association* v. *United States,* 10 CIT 48, 628 F. Supp. 978 (1986). The degree of technical skill or competence involved in the further work to be done, and the importance of the work to the functioning of the finished article are also considered in determining whether a substantial transformation has occurred. For example, Customs has previously ruled that broaching teeth into plier halves to provide the tool with its working edges, when followed by finishing operations such as grinding, sandblasting, heat treating, tempering, polishing assembly, electroplating and packaging is a substantial transformation and the U.S. manufacturer is the ultimate purchaser. Broaching teeth was considered a skilled machining operation which imparted essential characteristics to the article, Headquarters Ruling 723271, February 8, 1984 and Headquarters Ruling 721562, October 17, 1983.

In this case, the frame and adjustable jaw are not fully machined in their condition as imported and lack several important features of a finished wrench. We find that the broaching of the side hole into the frame and the broaching of the adjustable jaw, to accommodate the knurl, and the cutting of the teeth, coupled with the finishing operations that include het treatment, deburring, tempering, plating, logo, size and model number stamping, and assembly, substantially transform the imported frame and adjustable jaw, and that your client is the ultimate purchaser of the imported articles. Therefore, the frame and adjustable jaw may be excepted from individual marking under 19 U.S.C. 1304(a)(3)(D), provided: (1) the con-

tainers in which they are imported are legibly and conspicuously marked to indicate the country of origin; (2) Customs officers at the port of entry are satisfied that the articles will reach your client in the original marked containers, and (3) the articles will be used only in the manufacture of adjustable wrenches as described herein and not otherwise sold. Documentation to such effect may be required by Customs at the time of entry.

Holding:

The imported adjustable wrench frame and adjustable jaw are substantially transformed by your client, thus making your client the ultimate purchaser of the imported articles. The frame and jaw are excepted from marking, provided the containers in which they are imported are marked to indicate the country of origin and Customs officials at the port of entry are satisfied that the articles will be used only in the manner described above and will not be sold otherwise.

(C.S.D. 90–63)

Marking: The country of origin marking of articles imported in unsealed disposable retail containers.

Date: February 23, 1990
File: HQ 732709
MAR–2–05 CO:R:C:V 732709 EAB
Category: Marking

RICHARD L. BURRELL, VICE PRESIDENT FINANCE
R.G. BARRY CORPORATION
P.O. Box 129
Columbus, OH 43216

Re: Country of origin marking of articles imported in unsealed disposable retail containers

DEAR MR. BURRELL:

This is in reply to your September 1, 1989, letter requesting a ruling on country of origin marking requirements for footwear imported into the U.S. in plastic packaging.

Facts:

The sample submitted consists of a pair of slippers packaged in an unsealed translucent, colorless plastic bag with a plastic handle and hook at the top and a snap opening on the back. The slippers may be viewed while in the package or by unsnapping the bag and removing them. On the front of the bag is the printed phrase "Sold by 'Sears, Roebuck and Co.', Chicago, IL 69684." Examination of the article itself reveals a pair of woman's house slippers made of a

fabric upper and a hard rubber sole. The sole of each slipper is marked "Handcrafted in Mexico from U.S. Materials" directly above washing instructions and the size marking. Both the fabric upper and the rubber sole are distinctly the products of separate manufacturing processes using machinery. In particular, the fabric upper appears to consist of, primarily, an outer layer of terry cloth. This outer layer is uniformly stitched to an inner layer of fabric. The sole is plainly the product of a molding process, injection or otherwise. The upper and lower are combined by, at a minimum, stitching that must drive a threaded needle through not only two layers of fabric but an approximate 0.125 inch thick piece of hard rubber, and the stitching is uniform in length and location within the entire perimeter of the sole.

Issues:

a) Is the country of origin marking on the bottom of the slippers acceptable, or must the country of origin be reprinted on the bag; b) is the language "Handcrafted in Mexico from U.S. Materials" acceptable marking?

Law and Analysis:

a) Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The primary purpose of the country of origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy the product, if such marking should influence his will." *United States* v. *Friedlaender & Co.*, 27 CCPA (1940); *National Juice Products Association* v. *United States*, 10 CIT 48 (1986).

Part 134, Customs Regulations (19 CFR Part 134) implements the statutory country of origin marking requirements. Pursuant to 19 CFR 134.24(d)(3), if the article is in an unsealed disposable container that is normally opened by the ultimate purchaser prior to purchase, only the article need be marked.

Customs finds that the submitted sample consists of a container that normally would be opened by the ultimate purchaser, since it is easily snapped open and shut, thereby enabling the ultimate purchaser to remove the article for closer examination. Although in such circumstances generally only the article must be marked to indicate its country of origin, this is not the case where a U.S. address is on the container.

Pursuant to 19 CFR 134.46, in any case in which the name of any city in the U.S. appears on an imported article *or its container*, there shall appear, legibly and permanently, in close proximity to

such name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. In view of the U.S. address printed on the sample container, the requirements of this section apply. Since the country of origin marking on the bottom of the slippers is not in close proximity to the U.S. address, another country of origin marking which meets the requirements of 19 CFR 134.46 must appear on the bag.

b) Although Customs has ruled that "Handcrafted in Mexico" sufficiently indicated the country of origin of a product, *see* Headquarters Ruling Letter HQ 732689, December 7, 1989, the language must be accurate. Section 11.13, Customs Regulations (19 CFR 11.13), provides that articles (or their containers) which bear false designations of origin, or false descriptions or representations, including words or other symbols tending falsely to describe or represent the articles, are prohibited importation under 15 U.S.C. 1124, 1125 and other provisions of law, and shall be detained.

We find certain regulations of the Indian Arts and Crafts Board concerning the use of certificates identifying genuine handicrafts to be instructive in determining if the use of the word "handcrafted" is accurate in this case. One of the conditions of eligibility for the attachment of such a certificate is that the object be produced by Indian craftsmen "with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product," 25 CFR 308.3a.

Customs finds that the word "Handcrafted" tends falsely to describe the article. Both the upper and sole are clearly the products of separate manufacturing processes using machinery. The uniform stitching of the outer layer of the upper to the inner layer does not present an article that is fashioned chiefly by hand. The sole is plainly the product of a molding process, injection or otherwise. The upper and lower are combined by stitching that is uniform in length and location within the entire perimeter of the sole of each slipper. On the whole, we find that the article is not fashioned totally or chiefly by hand, especially with manual skill, even though skilled labor may be employed in operating the machinery that makes the components and combines them into the finished article.

Holding:

Imported house slippers packaged in an unsealed disposable container that is normally opened by the ultimate purchaser prior to purchase must be marked to indicate their country of origin. Where the name of a U.S. city appears on such packaging, the packaging also must be marked "Made in [country]," or "Product of [country]," or other words of similar meaning.

For purposes of this ruling only, "Handcrafted" tends falsely to describe or represent the article, and is, therefore, not in compliance with the marking requirements of 19 CFR 11.13.

(C.S.D. 90–64)

Marking: The country or origin marking of imported color print film.

Date: February 23, 1990
File: HQ 732842
MAR–2–05 CO:R:C:V 732842 KG
Category: Marking

CHARLES H. BAYAR
WHITMAN & RANSOM
200 Park Avenue
New York, N.Y. 10166

Re: Country of origin marking of imported color print film

DEAR MR. BAYAR:

This is in response to your letter of October 25, 1989, requesting a country of origin ruling regarding imported color print film. The questions raised concerning Federal Trade Commission requirements are not addressed in this letter.

Facts:

Your client proposes two different scenarios. In scenario one, your client would import from Japan a photographic film base consisting of tri-acetate plastic sheets with a non-photosensitive undercoating, in the form of rolls measuring 58" wide and 9,500 feet long. In the U.S. your client will prepare and apply to the film base a photosensitive emulsion coating measuring 0.02 mm thick, composed of 10 or more layers, with each layer consisting of dyes and chemicals containing suspended microscopic silver halide crystals. All of the ingredients of the emulsion coating will be purchased in the U.S. Once the emulsion coating is applied, the film base is usable as bulk photographic film.

The bulk photographic film is then cut to width and length, inserted into cassettes, which are placed in plastic sealed containers and packaged in sealed print paper boxes for retail sale. The individual boxes of film will be packed in sizable corrugated cartons for shipment to wholesale distributors. The production cost of the imported tri-acetate film base is projected to be 20% of the total cost.

In scenario two, your client proposes to import bulk photographic film from Japan and perform the cutting, inserting and packaging described in scenario one in the U.S. The projected production cost of the imported bulk photographic film is 65% of the total cost.

Issues:

Whether the imported film products are substantially transformed in the U.S.

Whether marking the country of origin on the sealed paper boxes containing the film satisfies section 304 of the Tariff Act of 1930, as amended.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru North America* v. *United States,* 701 F. Supp. 229, 12 CIT —— (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States* v. *Friedlaender & Co.,* 27 CCPA 297, 302 C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. As noted in your submission, section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines the term "country of origin" to mean the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such country the country of origin within the meaning of Part 134. Section 134.35, Customs Regulations (19 CFR 134.35), provides that articles used in the U.S. in manufacture which results in articles having a name, character or use differing from that of the imported articles will be within the principle of the decision in the case of *United States* v. *Gibson-Thomsen Co., Inc.,* 27 CCPA 267 (1940). Under this principle, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the ultimate purchaser of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. If the article is substantially transformed in the U.S., only the outermost container of the imported article shall be marked.

A substantial transformation occurs when articles lose their identity and become new articles having a new name, character or use. *United States* v. *Gibson-Thomsen Co.,* 27 C.C.P.A. 267 at 270 (1940), *National Juice Products Association* v. *United States,* 10 CIT ——, 628 F. Supp. 978 (CIT 1986), *Koru North America* v. *United States,* 12 CIT ——, 701 F. Supp. 229 (CIT 1988). In ORR Ruling 217–69

(March 28, 1969), Customs ruled that a U.S.-made film base was substantially transformed when it was coated with photographic emulsion in Italy. The resulting x-ray film was considered a product of Italy for marking purposes. The rolls of x-ray film were excepted from marking so long as the container in which the rolls were packaged were marked to indicate that Italy was the country of origin.

The process of coating the film base with photographic emulsion which was held in ORR Ruling 217–69 to be a substantial transformation is virtually identical to the process described in scenario one. Coating the film base with photosensitive emulsion containing silver halide crystals creates photographic film, a new article having a new name, very different physical characteristics from film base which is not photosensitive and a new use. Prior to coating, film base cannot be used to make photographic images. Therefore, in scenario one the film base is substantially transformed in the U.S. into bulk photographic film.

The important characteristics of print film are its light sensitivity and the ability to form an image from which a positive can be made. The imported article in scenario two already has those qualities when it enters the U.S. There is not change in name, character or use as a result of U.S. processing. The only change that occurs in the U.S. is that the film is cut to size and inserted into cartridges. This change, in which the film is prepared for packaging, is not consequential enough to constitute a substantial transformation. In scenario two, the imported bulk photographic paper is not substantially transformed in the U.S. and is considered a product of Japan, both before and after the U.S. processing.

In HQ 719942 (November 8, 1982), Customs ruled on a conflict of law question involving Canadian and U.S. law. Although the focus of that ruling was the conflict of law question, it did state that film cut to length, loaded into cartridges and packaged in Canada was substantially transformed there. This statement is not in accordance with the current views of the Customs Service. Therefore, to the extent that HQ 719942 conflicts with this ruling, it is modified.

The second issue raised concerns the marking of the retail film cartridges. This issue was also addressed in ORR 217–69; Customs ruled that the rolls of film were excepted from marking and only the container in which the rolls are packaged should be marked with the country of origin. Pursuant to 19 U.S.C. 1304(a)(3)(D) and section 134.32(d), Customs Regulations (19 CFR 134.32(d)), Customs excepts from individual marking requirements imported articles for which the marking of the containers will reasonably indicate the origin of the articles. As discussed above, the purpose of the marking statute is to allow ultimate purchasers to make informed buying choices. In scenario two, the film cartridge is only sold to ultimate purchasers in a sealed box. As long as the sealed box is properly marked with the country of origin of the film, the film cartridge it-

self and the sealed plastic holders that are inside the sealed paper box are excepted from marking.

Holding:

In scenario one, the imported film base is substantially transformed in the U.S. into bulk photographic film. Therefore, pursuant to 19 CFR 134.35 your client is the ultimate purchaser of the imported film base and the film base is excepted from marking. Only the outermost container of the film base is required to be marked. Further, no foreign country of origin marking is required on the retail boxes.

In scenario two, the imported bulk photographic film is not substantially transformed in the U.S. and would be considered a product of Japan for country of origin marking purposes. Therefore, your client is not the ultimate purchaser and the imported bulk photographic film must be marked with its country of origin. However, pursuant to 19 CFR 134.34, an exception may be authorized, in the discretion of the district director, for the imported film because it will be repacked after release from Customs custody if: the containers in which the articles are repacked will indicate the origin of the film to an ultimate purchaser in the U.S. and the importer arranges for supervision of the marking of the containers by Customs officers at the importer's expense or secures such verification as may be necessary, by certification and the submission of a sample or otherwise, of the marking prior to the liquidation of the entry.

In scenario two, the sealed box in which the print film is sold to ultimate purchasers must be properly marked with the country of origin of the film. The film cartridge itself and the sealed plastic holders inside the sealed paper box would be excepted from country of origin marking pursuant to 19 CFR 134.32(d).

U.S. Customs Service

General Notice

19 CFR Part 177

NOTICE OF PUBLIC MEETINGS ON PRE-ENTRY CLASSIFICATION PROGRAM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of public meetings.

SUMMARY: The pre-entry classification program, effective since January 1989, enables importers to obtain advice on the classification of their merchandise prior to importation. It promotes voluntary compliance, uniformity, and accuracy with regard to processing merchandise. In an effort to expand participation of the trade in the program, Customs will conduct open meetings at various field locations to discuss all aspects of pre-entry classification.

DATES, LOCATIONS AND TIMES OF MEETINGS:

Location	*Date and time*	*Address*
Seattle	May 22, 1990 1 p.m.–4 p.m.	Old Federal Building 909 First Avenue Room 2135 Seattle, WA 98174
San Francisco	May 24, 1990 9 a.m.–12 noon	Federal Building 450 Golden Gate Ave. Room 2007 San Francisco, CA 94102
Los Angeles	May 25, 1990 1 p.m.–4 p.m.	Port Administration Building 925 Harbor Plaza Long Beach Board Room 6th Floor Long Beach, CA 90802
Boston	May 31, 1990 1 p.m.–4 p.m.	Tip O'Neill Building First Floor Auditorium 10 Causeway Street Boston, MA 02222
Houston	June 5, 1990 9 a.m.–12 noon	World Trade Building Rotunda, Ground Floor 1520 Texas Street Houston, TX 77002

Location	*Date and time*	*Address*
New Orleans	June 6, 1990 1 p.m.–4 p.m.	U.S. Customs Service Room 223 423 Canal Street New Orleans, LA 70130
Miami	June 8, 1990 9 a.m.–noon	Cargo Clearance Center 6601 NW 25th Street Miami, FL 33122

FOR FURTHER INFORMATION CONTACT: Richard Dunkel, Quality Assurance Branch (202) 377–9239.

SUPPLEMENTARY INFORMATION: Effective January 1, 1989, the Customs Service instituted, on a limited test basis, the Pre-Entry ("line review") Classification Program. This program provides reliable classification advice prior to importation, provides uniformity in classification decisions. Pre-entry classification is specifically designed to render binding classification advice on larger volumes of commodities. The decisions are effective at all ports of entry. The program promotes voluntary compliance, uniformity, and accuracy with regards to processing merchandise.

Based on the success of the program, Customs is looking to expand participation in Pre-entry Classification. To that end, open meetings will be held at various field locations to discuss the program with the trade and brokerage communities. A representative from Customs Headquarters and New York will be present at all these meetings.

Dates and locations for New York and the Chicago Region will be forthcoming in a future Federal Register Notice.

Dated: May 15, 1990.

RICHARD R. ROSETTIE,
Acting Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, May 17, 1990 (55 FR 20558)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis*

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

*Judge Frederick Landis passed away on March 1, 1990.

Decisions of the United States Court of International Trade

(Slip Op. 90–40)

ALLEN ROBBINS AND ROBBINS, INC., PLAINTIFFS *v.* JAMES A. BAKER, ET AL., DEFENDANTS

Court No. 85–10–01442

MEMORANDUM OPINION AND ORDER

[Judgment for defendants.]

(Decided April 27, 1990)

Herbert Peter Larsen for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Michael P. Maxwell*, attorney) Department of Justice, Civil Division, Commercial Litigation Branch, for defendants.

WATSON, *Judge:* This action was brought to contest the revocation by the Secretary of the Treasury of the Customshouse brokers licenses of Allen Robbins and Robbins, Inc. The revocation was based primarily on a determination that over a period of approximately seven months, from approximately one hundred transactions with importers, Robbins, Inc. had received a sum of approximately $120,000 as duty payment and had failed to timely pay it over to Customs as required by 19 C.F.R. § 111.29.

Plaintiffs have proceeded by way of a motion for summary judgment based on claims that the revocation was not supported by substantial evidence, that the administrative process was flawed by the submission of *ex parte* documents, and that the penalty of revocation was arbitrary and capricious.

The government has moved for judgment on the agency record under Rule 56.1 of the Rules of the C.I.T. The Court treats these as opposing motions for judgment in an action in which the issues are to be decided based on whether the contested decision is supported by substantial evidence in the administrative record. The Court's review of the record persuades it that defendants' motion should be granted and plaintiffs' motion should be denied.

Robbins, Inc. is a corporate Customshouse broker licensed in Miami, Florida. Its corporate license is supported by individual licenses issued to Allen Robbins, serving as president and treasurer, and Stuart Robbins, serving as vice president and secretary. The

revocation of Stuart Robbins' license is the subject of a separate action decided concurrently with this one (Court No. 85–09–01319).

In June of 1982, the Customs Service informed Robbins, Inc. that a number of its checks had been returned for insufficient funds and that it would therefore be required to pay for services and estimated duties either in cash or by certified check. In addition, Robbins, Inc. was informed that it had failed to pay estimated duties on ten released entries of merchandise. In July, Customs ascertained that Robbins, Inc. had failed to pay estimated duties on sixty entries for which it had secured immediate release and had also failed to file the entry summaries for those entries. In August Customs officials met with Allen Robbins to discuss the failure to comply with Customs regulations. At that time Allen Robbins said that Robbins, Inc. would be able to file the entry summaries but could not pay the estimated duties which clients had advanced because Robbins, Inc. no longer had those funds.

In October, 1982, Customs audited Robbins, Inc. The audit disclosed a failure to pay over to Customs the duties owed on more than 100 entries, which monies had been advanced to Robbins, Inc. by the importers. Allen Robbins admitted to the auditor that the money had been received, had not been paid to Customs, but had been used to cover business expenses.

In September, 1983, two Customs agents interviewed Allen Robbins. He once again admitted that Robbins, Inc. had diverted the monies advanced by importers for duty payments. The agents found that no criminal violations were intended but that the conduct was the result of poor business management. Thereafter, plaintiffs were notified of preliminary proceedings in accordance with 19 C.F.R. § 111.59. In January, 1984, preliminary proceedings were held by the District Director at which time plaintiffs were represented by counsel. In February of 1984, the District Director recommended that formal proceedings be held. In May of 1984, the Commissioner of Customs issued a Notice of Charges to the plaintiffs alleging that Robbins, Inc. had violated 19 C.F.R. § 111.29 by failing to pay duties within thirty days of receipt of monies earmarked for that purpose by importers. That notice listed 109 entries for which funds had been diverted. In August of 1984, Allen Robbins filed a verified answer to the Notice of Charges which admitted delays in the payment of duties. Later in that month an administrative hearing was conducted before William L. Duncan who was also serving as District Director of Customs in St. Louis, Missouri.

At the hearing three witnesses testified in support of the charges. They were John Gray, the Director of Classification and Value Division of the Miami District of Customs; Special Customs Agent Valeria Rhinehart; and Donald L. Robbins, Regulatory Auditor for Customs. Stuart Robbins testified on his own behalf. In April of 1985, hearing officer Duncan issued a report and recommendation based on the Revocation Hearing. He found that a diversion of funds had

been proved in 103 of the 110 instances charged in the Notice of Charges. He further found that the diverted funds were used to pay the salaries of Stuart and Allen Robbins, as well as other operating expenses of Robbins, Inc. He recommended that the corporate license of Robbins, Inc. be revoked and that the individual licenses of Allen and Stuart Robbins be suspended for 120 days. Following a period in which all parties filed exceptions to the hearing officer's report, the Secretary of the Treasury adopted the Findings of Fact and Conclusions of Law of the hearing officer. The Secretary, however, ordered the revocation rather than the suspension of the individual licenses of Allen Robbins and Stuart Robbins in addition to the revocation of the corporate license.

The Court's review of the record persuades it that there was substantial evidence that plaintiffs violated 19 C.F.R. § 111.29 and that there were no defects or errors in the proceeding sufficient to place the result in doubt.

19 C.F.R. § 111.29 provides, *inter alia*, that "funds received by a broker from a client for payment of a duty, tax, or other debt or obligation owing to the Government shall be paid to the Government within 30 days from the date of receipt or date due, whichever is later." Substantial evidence in these circumstances means the relevant evidence which a reasonable mind would accept as adequate to support a conclusion. *American Wire Co.* v. *United States*, 8 CIT 20, 590 F. Supp. 1273 (1984), *aff'd sub nom. Armco Inc.* v. *United States*, 760 F.2nd 249 (Fed. Cir. 1985); *See also Baltimore Security Warehouse, Co.* v. *United States*, 9 CIT 641 (1985).

Although plaintiffs stress the absence from the record of the actual books and records of Robbins, Inc. and the specific entry documents involved, and the failure to produce live testimony from clients of Robbins, Inc., this was not necessary. The charges in such hearings do not have to be proven in accordance with the formalities required by the Federal Rules of Evidence. In the present case there was ample evidence to support the Secretary's determination. The verified answer admitted delays in payments of duties and admitted that some of the clients' funds received by Robbins, Inc. were not timely paid. Qualified witnesses testified to the fact that Allen Robbins admitted that he diverted funds in contravention of 19 C.F.R. § 111.29. Their testimony would have been admissible under Rule 801 of the Federal Rules of Evidence and in all probability would be sufficient to constitute substantial evidence by itself.

The documentary evidence admitted at the administrative hearing was also substantial. The Customs Audit Report, which was directly based on the broker's records, constituted evidence of the diversion of funds. The Customs auditor testified that in the audit he located the entries in the corresponding invoices and identified the specific instances in which duty had not been paid. All the other documentary evidence submitted at the hearing, including the Audit Report, the Customs correspondence, and the Report of Investi-

gation supported a conclusion that a diversion of funds had occurred.

Plaintiffs have alleged that the proceedings were flawed by *ex parte* communications between counsel for the Customs Service and the Secretary of the Treasury. The first alleged *ex parte* communication was the Customs Services' Exceptions to the Hearing Examiner's Recommendation. The second alleged *ex parte* communication was the legal analysis of the entire administrative record by the General Counsel's Office. The Exceptions were served on counsel for the plaintiffs and did not give rise to a right of reply to those exceptions. This cannot be characterized as an *ex parte* communication. The legal analysis by the General Counsel's office would appear to be more in the nature of an internal assessment of the case than an adversary document to which a right of reply attaches. The Court sees no reason to consider these as *ex parte* communications which impaired the fairness of the proceeding.

As regards the Secretary's determination to revoke the individual license of Allen Robbins and the corporate license of Robbins, Inc., the Court cannot say that this was an arbitrary and capricious action. It was well within the authority of the Secretary under the terms of 19 U.S.C. § 1641(b), which gives him the discretionary power to revoke or suspend a broker's license, or to impose a monetary penalty. The scope of judicial review of such a decision does not permit the Court to substitute its judgment for that of the agency. *See Barnhart* v. *United States Treasury Department*, 9 CIT 287, 613 F. Supp. 370 (1985). For the reasons given above, it is the decision of this Court that the defendants' motion for judgment on the administrative record be and the same hereby is granted. It is the further decision of the Court that the plaintiffs' motion for summary judgment be and the same hereby is denied.

(Slip Op. 90–41)

STUART ROBBINS, CHB LICENSE NUMBER 5522, PLAINTIFF *v.* SECRETARY OF THE TREASURY, DEFENDANT

Court No. 85–9–01319

MEMORANDUM OPINION AND ORDER

[Judgment for defendant.]

(Decided April 27, 1990)

Thomas, Rabb & Strader, P.A., (*Daniel W. Raab*, of counsel), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Michael P. Maxwell*, attorney) Department of Justice, Civil Division, Commercial Litigation Branch, for defendants.

WATSON, *Judge:* Plaintiff brought this action to challenge the revocation of his Customshouse Broker's License by the Secretary of the Treasury. The revocation arose from the same facts as gave rise to the case of *Allen Robbins and Robbins, Inc.* v. *James A. Baker, Et Al.,* Court No. 85–10–01442. The underlying cause of the revocation was the repeated failure of the brokerage of Robbins, Inc. to timely pay over to the Customs Service the sums paid to it by importers for customs duties.

The main distinction sought to be drawn by the plaintiff is based on his position that he was not actively involved in the affairs of the brokerage during the period in which the violations occurred. Plaintiff's complaint has three counts. The first alleges that the Secretary of the Treasury libeled him by calling the grounds for revocation a misappropriation of money. The second count alleges that the Secretary abused his discretion by failing to take into account the passive nature of plaintiff's role. The third count alleges that the plaintiff was not given proper notice in the administrative proceedings. The third count is the subject of plaintiff's motion for summary judgment. Defendant responded to the motion for summary judgment by making a motion for judgment on the agency's record under Rule 56.1. The dispute can be resolved without giving importance to the discordant form of the motions by the parties. It is treated as arising in dispositive motions which must be resolved based on the administrative record.

The libel claim of Count 1 is clearly outside the jurisdiction of this Court. In *Bar Bea Truck Leasing Co., Inc.* v. *United States,* 4 CIT 70, 546 F. Supp. 558 (1982), *aff'd* 713 F.2d 1563 (1983) the Court held that claims of injury or damage as a result of the alleged tortious acts of Government employees are within the exclusive jurisdiction of the District Courts by virtue of the Federal Tort Claims Act, 28 U.S.C. § 1346(h). Accordingly, the claim made in the first count must be dismissed for lack of subject matter jurisdiction.

The claim of a passive role made in Count 2 will also not benefit plaintiff. On the subject of Stuart Robbins' role, the Hearing Officer concluded as follows:

> 1. Robbins, Inc. violated the requirements of 19 C.F.R. § 111.29 in 103 instances as cited in the charges 1 through 110, excluding charges #3, 5, 8, 12, 66, 67, and 97 by failing to pay to the Government within 30 days of receipt duty funds received by the broker from the importer. The broker failed to exercise due diligence in making these financial settlements.
>
> 2. *Allen Robbins, and Stuart Robbins were the individual licensees responsible for the conduct of Robbins, Inc., the corporate broker.* They are thus responsible for the violations of Robbins, Inc. of 19 C.F.R. § 111.29.
>
> 3. The above-cited 103 instances of failure to exercise due diligence in making payments to the U.S. Customs Service is strong evidence of lack of responsible supervision of Robbins, Inc.

4. *Allen Robbins and Stuart Robbins each failed to exercise responsible supervision and control over the transaction of Customs business of the corporation as required by 19 C.F.R. § 111.28 for the proper required conduct of the brokerage business.*

5. The violations cited above of 19 C.F.R. § 111.29 and 19 C.F.R. § 111.28 constitute grounds for the revocation or suspension of the licensees; Robbins, Inc., Allen Robbins, and Stuart Robbins as provided for in 19 C.F.R. § 111.53 due to failure to comply with the duties, responsibilities and requirements of Customhouse brokers.

The Court finds that there is substantial evidence in the record to support these conclusions and that under the law this does indeed constitute a failure to exercise responsible supervision and control over the transaction of Customs business of the corporation and is therefore a violation of 19 C.F.R. § 111.28. The Court cannot accept the argument that plaintiff fulfilled his responsibilities by delegating them to his brother, Allen Robbins. It would be anomalous to allow a Customs broker whose individual license and supervision is a predicate for the operation of a corporate brokerage to insulate his individual license from revocation by pleading a lack of involvement in the affairs of the brokerage. If the brokerage violates the regulations then it may either be attributable to acts of the individual brokers or to their failure to properly supervise the affairs of the brokerage. In either event, the individual license must be considered subject to the revocation authority of the Secretary of the Treasury in the circumstances. This conclusion also has implications for plaintiff's third claim, namely, that Customs failed to give him an opportunity to comply with Customs regulations in accordance with 5 U.S.C. § 558(c).

5 U.S.C. § 588(c) of the Administrative Procedure Acts states as follows:

> Except in case of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given
>
> (1) Notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

It is the opinion of the Court that to the extent that the revocation of this license was based on the failure to exercise proper supervision over the affairs of the brokerage, the withdrawal of the broker from participation in those affairs must be considered to be a willful act as opposed to a negligent or inadvertent act. Accordingly, it would seem proper that in order for the agency to take action regarding the consequences of such a failure of supervision, it need not give notice to the broker. Since the record shows that plaintiff

had a full measure of participation in the proceedings it appears that there was no illegality or unfairness in the eventual revocation of his broker's license.

For the reasons given above it is the decision of the Court that defendants' motion for judgment on the record be granted and plaintiff's motion for summary judgment be denied.

(Slip Op. 90–42)

PENROD DRILLING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 87–02–00170, 87–04–00608, 87–10–01022, and 87–11–01073

[Plaintiff's motions to set aside judgment entered herein on December 13, 1989 and to grant rehearing and to extend time to appeal denied.]

(Decided May 1, 1990)

Haight, Gardner, Poor and Havens (*John W. McConnell, Jr.*), for plaintiff.

Stewart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Barbara M. Epstein*) for defendant.

OPINION AND ORDER

TSOUCALAS, *Judge:* This case is before the Court on plaintiff's motion to set aside the judgment entered herein on December 13, 1989, and to grant rehearing on the grounds that the Court committed manifest errors of law and that the judgment is contrary to law.[1] Plaintiff also has motioned the Court to extend its time to file an appeal of the judgment of December 13, 1989 to the United States Court of Appeals for the Federal Circuit.

I. *Motion to Set Aside Judgement and to Grant Rehearing:*

This Court, having received no response to plaintiff's motions to set aside judgment and to grant rehearing from defendant, issued an order on March 2, 1990, granting a rehearing and scheduling oral argument for March 14, 1990. On March 5, 1990, defendant moved to vacate the order and requested the Court grant defendant's consent motion for leave to file an out of time response to plaintiff's motion on the grounds that the defendant was never served with said motion. On March 7, 1990, this Court granted defendant's motion for leave to file a response out of time but denied the motion to set aside oral argument.

On March 13, 1990, defendant filed its response to plaintiff's motion to set aside the judgment and to grant rehearing. In its response, defendant claimed it had no knowledge of plaintiff's motion until it received the Court's order of March 2, 1990. On the same

[1] Plaintiff's motions pertain to that part of the judgment concerning the remission or refund of duties assessed by the United States Customs Service for repairs completed on four of plaintiff's vessels. *Penrod Drilling Co. v. United States*, 13 CIT ——, Slip Op 89–168 (December 13, 1989). The Court therein granted defendant's motion to dismiss for lack of jurisdiction.

day, plaintiff notified the Court that, after reading defendant's opposition, it was withdrawing its request for oral argument and asked the Court to decide the motion on the papers.

The judgment in this case was entered on December 13, 1989. On January 11, 1990, plaintiff moved the Court to set aside the judgment and to grant a rehearing. The certificate of service attached to the motion papers filed in this Court indicates that a copy was sent by ordinary mail on January 10, 1990 from the office of plaintiff's counsel in Washington, D.C. to the office of the defendant's counsel in New York City. Defendant, in its response, alleges that it did not receive plaintiff's motion within thirty (30) days of the judgment, as required by Rule 59(b) of the Rules of this Court, and thus the Court lacks jurisdiction over the matter.

It is well established that the decision whether to grant or deny a motion for rehearing is within the sound discretion of the court. *Sharp Electronics Corp.* v. *United States,* 14 CIT ——, ——, 729 F. Supp. 1354, 1355 (1990); *Channel Master, Div. of Avnet, Inc.* v. *United States,* 11 CIT 876, 877, 674 F. Supp. 872, 873 (1987). Furthermore, Rule 59(a) of the Rules of this Court provides that a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." *See also St. Regis Paper Co.* v. *United States,* 13 CIT ——, Slip Op. 89–166 (Dec. 11, 1989).

However, before the Court may consider the sufficiency of the reasons submitted by plaintiff, jurisdiction for the action must exist. Rule 59(b) of the Rules of this Court reads as follows:

> (b) TIME FOR MOTION.
>
> A motion for a new trial or rehearing shall be *served and filed* not later than 30 days after the entry of judgment or order.

(Emphasis added). Defendant claims it was not served with the motion within thirty days after the judgment was issued on December 13, 1989. *Defendant's Response to Plaintiff's Motion to Set Aside Judgment and Grant Rehearing* ("Defendant's Response") at 4. For plaintiff's motion to have been served timely, it must have been served by January 12, 1990, that is, thirty days from the date that judgment was entered by this Court.

Rule 5(g) of the Rules of this Court states that service of a pleading or paper by mail

> is completed when *received,* except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served * * * with the proper postage affixed and return receipt requested, shall be deemed served * * * as of the date of mailing.

(Emphasis added). This rule was reaffirmed in *Belfont Sales Corp.* v. *United States,* 12 CIT ——, 698 F. Supp. 916 (1988), *aff'd,* 878 F.2d 1413 (Fed. Cir. (T) 1989), where the court held that service of a mo-

tion for a rehearing must be *received* by the opposing party within thirty days of judgment when service is made by ordinary mail, otherwise the court lacks jurisdiction. *Id.* at ——, 698 F. Supp. at 919. There, the court wrote that, unlike the Federal Rules of Civil Procedure, which state that "[s]ervice by mail is complete upon mailing," the rule in the Court of International Trade is that service by mail is not complete until receipt by the party to be served, unless certified or registered mail is used. *Id.* at ——, 698 F. Supp. at 919; *see also* Fed. R. Civ. P. 5(b).

In the present action, plaintiff's certificate of service indicates that a copy of the motion for rehearing was sent by ordinary mail on January 10, 1990 from Washington, D.C. to New York City. Defendant attests that it did not receive service by January 12, 1990, and indeed, as of March 13th, the motion still had not been received by defendant's office. *Defendant's Response* at 4. Defendant's office log of incoming mail supports this assertion. *Defendant's Exhibit A.* Moreover, it is not reasonable to believe that papers mailed via ordinary mail from Washington on January 10th would be received in New York by January 12th.[2] Plaintiff should have allowed more time for delivery, or used registered or certified mail.

Accordingly, plaintiff's motion to set aside judgment and to grant rehearing is denied on the basis that the Court lacks jurisdiction insofar as defendant was not served within thirty days of judgment, as required by the Rules of this Court.

II. *Motion To Extend Time for Appeal:*

Plaintiff filed a motion to extend its time to file an appeal of the original judgment on March 12, 1990, pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure ("Fed. R. App. P.").[3] Plaintiff acknowledges that it did not file its appeal within the required sixty (60) days from judgment, that is, February 12, 1990.[4] However, plaintiff claims that it is entitled to an extension because of "excusable neglect or good cause" since plaintiff's attorney did not learn of the fact that defendant did not receive plaintiff's initial motions until after the sixty day deadline had expired. *Plaintiff's Motion to Extend Time for Appeal.*

Plaintiff's motion is based on its argument that since the copy of its motion to set aside judgment and grant rehearing apparently was lost in the mail, it should not be held responsible for its failure to file notice of appeal within sixty days. Penrod argues that it "assumed" the initial motion had been timely served upon defendant

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[2]The evidence shows that plaintiff also mailed, by ordinary mail, a change of address form to defendant's office labeled "Praecipe" on the same data as the motion for a rehearing. *Defendant's Exhibit B.* Defendant's log for incoming mail shows that the Praecipe was not received until January 18, 1990. *Defendant's Exhibit C.* Thus, it appears that, even if the motion had been received by defendant, it likely would not have been received by January 12th.

[3]Rule 4(a)(5) of the Federal Rules of Appellate Procedure is applicable to appeals from judgments of the Court of International Trade to the Court of Appeals for the Federal Circuit. *See Quintin* v. *United States*, 746 F.2d 1452, 1453 (Fed. Cir. (T) 1984).

[4]Though the sixtieth day from judgment was February 11, Fed. R. App. P. 26(a) allows an extension until February 12 because the 11th was a Sunday.

and thus that the time to appeal was tolled until that motion was acted on. *Plaintiff's Motion to Extend Time for Appeal.*

Rule 4(a)(1) of the Fed. R. App. P. requires that a notice of appeal against a judgment where the United States is a party must be filed within sixty (60) days after entry of judgment. In this case, plaintiff's motion to extend time for appeal was filed on March 12, 1990; the deadline for filing was February 12, 1990. Therefore, plaintiff's motion was filed more than sixty days after judgment.

However, Rule 4(a)(1) is subject to an exception for delays in filing due to "excusable neglect or good cause." Fed. R. App. P. 4(a) (5).[5] Hence, if Penrod can make a clear showing of either, it is entitled to an extension of time to appeal.[6] Plaintiff's argument is that the delay in mail delivery is what caused its motion to be filed after the sixty day period expired and that this constitutes "excusable neglect or good cause." *Plaintiff's Motion to Extend Time for Appeal.*

There have been many cases in the federal courts addressing the issue of late filing due to slow mail delivery. In *Seneca Grape Juice Corp.* v. *United States,* 61 CCPA 118, 492 F.2d 1235 (1974), our appellate court held that a notice of appeal which was one day late due to unusually slow mail delivery between New York and Washington, D.C. was untimely and had to be dismissed. *Id.* at 118, 492 F.2d at 1235. In *Reinsurance Co. of America, Inc.* v. *Administratia Asigurarilor de Stat,* 808 F.2d 1249 (7th Cir. 1987), the court held that appellant was not entitled to an extension where it mailed notice of appeal from New York on December 24th expecting it to arrive in Chicago three days later. The court stated that delays in mail delivery, particularly during holiday seasons, are reasonably foreseeable and " 'good cause' is not furnished by blaming the postal service for [appellant's] inexplicable lack of foresight." *Id.* at 1253.[7]

Defendant acknowledges that extensions have been granted where "notice is mailed in time so that in normal course it will arrive in time, but it does not." *Defendant's Response to Plaintiff's Motion to Extend Time to Appeal* at 9, (citing 9 Moore's Federal Practice § 204.13 at 4–105, n.18). As stated above, however, the Court finds that two days is not sufficient time for mail sent by ordinary mail from Washington, D.C. to arrive in New York City. When plaintiff used ordinary mail, it ran a very substantial risk, indeed it was a virtual certainty that the notice would not arrive in time. Such a foreseeable result cannot be labeled either excusable neglect or good cause.

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[5]The extension must be sought no later than thirty (30) days after the sixty (60) day period for notice of appeal has expired. Fed. R. App. P. 4(a)(5). That requirement has been satisfied in this case.

[6]Where, as in this case, the motion to extend time for appeal is filed after the time for filing has expired, the showing of excusable neglect or good cause must be "clear." *United States* v. *Atkinson,* 748 F.2d 659, 661 (Fed. Cir. (T) 1984). This is a higher standard than a mere showing of either.

[7]Good cause was shown in *Scarpa* v. *Murphy,* 782 F.2d 300 (1st Cir. 1986), where the post office took seven days to delivery a notice of appeal just three miles. The significant factual differences render that rationale inapplicable here.

Plaintiff attempts to distinguish between *slow* mail delivery and *no* mail delivery, claiming that the fact that the papers apparently were neither delivered to defendant nor returned to plaintiff is evidence of postal negligence for which plaintiff is not responsible. *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Extend the Time for Appeal.* Penrod asserts that the apparent failure of the Post Office to deliver plaintiff's motion at all was an unforeseeable event which constitutes excusable neglect or good cause. *Id.* at 7. The distinction is not a valid one since even a relatively short and more foreseeable delay in delivery would have produced the same result, namely plaintiff's failure to serve defendant within the statutory time limit.

Plaintiff had a responsibility to know that papers sent by ordinary mail are not deemed served until received, and thus should have allowed more time for delivery or used certified or registered mail. Furthermore, plaintiff could have ascertained whether defendant received a copy of the motion, especially when it realized that defendant had not served a response in time. Though plaintiff is under no obligation to do so, it would have been a prudent gesture given the mode of service chosen by plaintiff. It cannot now seek a reprieve because of delays or faults in postal delivery service.

As for plaintiff's claim that the filing of the motion to set aside judgment and to grant rehearing tolled the sixty day period for filing notice of appeal, tolling is available only where the first motion is timely served. *Windsor* v. *United States,* 740 F.2d 6, 7 (6th Cir. 1984); *In re Todd Corp.,* 662 F.2d 339, 340 (5th Cir. 1981). Here, the motion to set aside judgment and to grant rehearing was not timely served on defendant and therefore did not operate to toll the period within which to file notice of appeal.

Conclusion

Plaintiff's motion to set aside this Court's judgment of December 13, 1989 and to grant a rehearing is dismissed for lack of jurisdiction inasmuch as the motion was not timely served on defendant.

Plaintiff's motion to extend time for appeal is dismissed because it was filed more than sixty days after entry of judgment by this Court, and plaintiff has not made a clear showing of excusable neglect or good cause pursuant to Fed. R. App. P. 4(a)(5).

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/114 4/23/90 Musgrave, J.	One Up Fashions, Inc.	86-5-0598	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/115 4/23/90 Musgrave, J.	One Up Fashions, Inc.	86-8-01021	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/116 4/23/90 Musgrave, J.	One Up Fashions, Inc.	86-8-01044	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/117 4/23/90 Musgrave, J.	One Up Fashions, Inc.	87-3-00509	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/118 4/23/90 Musgrave, J.	One Up Fashions, Inc.	87-8-00869	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/119 4/23/90 Musgrave, J.	One Up Fashions, Inc.	88-2-00148	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/120 4/23/90 Musgrave, J.	One Up Fashions, Inc.	88-8-00802	Not stated	376.56 Various rates	Agreed statement of facts	New York Outerwear garments
C90/121 4/24/90 Restani, J.	Smerling Enterprises	88-12-00894	700.59 37.5%	700.56 6%	Agreed statement of facts	New York Men's kid vinyl slippers
C90/122 4/26/90 Re, C.J.	Butler Shoe Corp.	86-7-00879	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136	New York Leather trimmed shoes
C90/123 4/26/90 Re, C.J.	Etonic Inc.	87-5-00662	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Boston Leather trimmed shoes

C90/124 4/26/90 Re, C.J.	Felsway Corp.	83–7–01056	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	New York Leather trimmed shoes
C90/125 4/26/90 Re, C.J.	Smerling Imports, Inc.	85–1–00052	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	New York Leather trimmed shoes
C90/126 4/26/90 Re, C.J.	Zayre Corp.	83–1–00008	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Boston Leather trimmed shoes

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V90/24 4/27/90 Tsoucalas, J.	Intalco Aluminum Corp.	84-7-01014	Computed value	At total invoice value for entry, in U.S. dollars, plus 20% of difference between total appraised value and the total invoice value	Agreed statement of facts	Not stated Calcined petroleum coke
V90/25 4/27/90 Tsoucalas, J.	Intalco Aluminum Corp.	86-9-01238	Computed value	At total invoice value for entry, in U.S. dollars, plus 20% of difference between total appraised value and the total invoice value	Agreed statement of facts	Not stated Calcined petroleum coke

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